CHAPTER III

INVESTIGATION AND CASE DEVELOPMENT

This Chapter sets forth the manner in which the Antitrust Division usually conducts its investigations and the procedural steps that ordinarily are followed during an investigation. This Chapter will assist attorneys and economists in initiating and conducting an investigation, both factually and legally, and in deciding whether to recommend prosecution.

The Chapter also describes various other Division responsibilities including Business Reviews, Export Trade Certificates, judgment terminations, and the premerger notification procedures of the Hart-Scott-Rodino Antitrust Improvements Act of 1976.

A. Finding and Evaluating Antitrust Complaints

The Antitrust Division's investigations arise from a variety of sources including:

1. complaints received from citizens and businesses when they believe that companies or individuals are engaged in unlawful conduct;

2. analysis and evaluation of filings under the premerger notification provisions of the Hart-Scott-Rodino Antitrust Improvements Act of 1976;

3. press reports of various practices that come to the Division's attention through the monitoring of newspapers, journals, and the trade press;

4. "inside" information obtained from informants, or individuals or corporations applying for amnesty;

5. complaints and information received from other government departments or agencies;

6. complaints and referrals received from United States Attorneys and state attorneys general;

7. analysis of particular industry conditions by Division attorneys and economists, including systematic industry screenings;[1] and

[1] The purpose of a screening analysis is to determine whether particular anticompetitive activities may be taking place within an industry. Such investigations are conducted to determine if preliminary inquiry authority is warranted. Screening investigations require an "AMIS New Matter Form" (ATR

8. monitoring of private antitrust litigation to determine whether the Division should investigate the matter.

The assignment of specific responsibilities to each of the sections, task forces, and field offices assists in the uncovering of suspected violations. Each section, task force, and field office is responsible for identifying violations within its area of responsibility. In addition, general complaints received by the Front Office are referred to a section, task force, or field office, as appropriate.

The attorney, economist or paralegal who receives a complaint should develop information from the complainant, from trade publications and other public sources, and from governmental entities. See infra Chapter VI, Section B. Except under unusual circumstances that require the approval of the appropriate Director of Enforcement, the attorney, economist or paralegal must not communicate with other individuals within the industry, or individuals and corporations that may be implicated in the alleged violation for three reasons. First, the Division does not begin a formal investigation until a policy and factual determination has been made that an investigation should proceed and the Division's resources should be committed. Second, the Division and the Federal Trade Commission clear proposed investigations with each other before they are opened. The purpose of this clearance procedure is to ensure that both agencies are not investigating the same conduct and to avoid burdening the parties under investigation and potential witnesses with duplicative requests. See infra Section B.3; Chapter VII, Section A. Third, contact may prematurely tip-off the subject of the investigation that an inquiry has been or may be initiated.

B. Recommending a Preliminary Inquiry

1. Standards for Approving a Preliminary Inquiry

Generally, a preliminary inquiry ("PI") will be authorized by the Antitrust Division if (a) there are sufficient indications of evidence of an antitrust violation; (b) the amount of commerce affected is substantial; (c) the investigation will not needlessly duplicate or interfere with other efforts of the Division, the Federal Trade Commission, a United States Attorney, or a state Attorney General; and (d) resources are available to devote to the investigation. Although an investigation does not formally become "civil" or "criminal" until compulsory process in the form of CIDs, Second Requests, or grand jury subpoenas is issued, a preliminary judgment is usually made when the PI request is submitted as to

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141). See Division Directive ATR 2810.1 "Antitrust Management Information System (AMIS)" (providing instructions on the completion of this form). The attorney or other professional should also fill out a Conflict of Interest Certification, a copy of which may be found on the Forms menu of the word processing system.

whether the investigation will be pursued as a civil or criminal matter. Generally, the type of conduct will govern the civil/criminal determination (e.g., merger matters are pursued civilly, per se price fixing is pursued criminally). See infra Section C.6 (discussing standards for determining whether to proceed by civil or criminal investigation). Among other things, the civil/criminal decision will determine which Director of Enforcement will supervise the matter.

In a civil matter, from the outset, attention should be given to the legal theory, relevant economic learning, the strength of likely defenses, any policy implications and the potential doctrinal significance of the matter. The greater the potential significance of the matter, the more likely it is that the request will be approved.

In a matter where the suspected conduct appears to meet the Division's standard for a criminal proceeding, see infra Section C.6, the decision whether to open an investigation will depend on three questions. The first of these is whether the allegations or suspicions of a criminal violation are sufficiently credible or plausible to call for a criminal investigation. This is a matter of prosecutorial discretion and is based on the experience of the approving officials; there is no legal standard. The second question is whether the matter is "significant." Determining which matters are "significant" is a flexible, matter-by-matter analysis that involves consideration of a number of factors, including: volume of commerce affected; geographic area impacted (including whether the matter is international); the potential for expansion of the investigation or prosecution from a particular geographic area and industry to an investigation or prosecution in other areas or industries; the deterrent impact and visibility of the investigation and/or prosecution; the degree of culpability of conspirators (e.g., the duration of the conspiracy, the amount of overcharge, any acts of coercion or discipline of cheaters, etc.); and whether the scheme involved a fraud on the federal government. Because the Division's mission requires it to seek redress for any criminal antitrust conspiracy that victimizes the federal government and, therefore, injures American taxpayers, this last factor can potentially trump all of the others. The third question--what resources will be required to investigate and prosecute the matter--is asked only for matters that are assessed as having lesser significance; the Division is committed to prosecuting all matters of major significance.

Based on these general guidelines, a request for a PI is reviewed by the appropriate Director of Enforcement. If the request is approved and FTC clearance is obtained, PI authority is granted.

2. Making a Request for Preliminary Inquiry Authority

Once an attorney has developed a sufficient factual and legal basis to believe that a matter is appropriate for formal investigation, the attorney should prepare a short factual memorandum to the section, task force, or field office Chief describing the nature and scope of the activity (the "PI Request Memo") using the "Request For PI Authority" macro. This PI Request Memo should set forth the following information on the first page:

1. the commodity or service to be investigated;

2. the alleged illegal practice (the specific practice should be outlined if practicable, e.g., price fixing, boycott, monopolization, illegal acquisition, etc. -- not merely "restraint of trade");

3. the relevant statute (e.g., Section l, Sherman Act);

4. the parties involved (state the full name and location of the known companies and their corporate parents, as well as individuals involved);

5. the amount of commerce affected on an annual basis (if information is unknown, provide a reasonable estimate); and

6. the geographic area involved (e.g., nationwide, worldwide, Eastern Virginia, etc.).

This detailed information is necessary to evaluate the request, to obtain FTC clearance, and to determine whether any other Division component is investigating, or has investigated, the same activity. Staff must develop this information only from public sources, governmental entities, or the complainant, however, because the staff may not initiate contact with the parties or other private entities prior to approval of the request and FTC clearance.[2]

After this basic information is set forth, the staff should provide a factual summary of the information upon which the request is based. Evidence supporting a potential antitrust violation, as well as any contrary evidence, should be briefly described. Special considerations, such as the existence of private litigation, a statute of limitations problem, the presence of a governmental agency as a potential victim, the possible precedential or deterrent impact of the matter, or other legal or factual circumstances relevant to the decision-making process should be discussed. For matters that will likely remain civil, potential defenses should be identified and addressed, and relevant economic issues should be outlined. The potential significance of the matter from an economic and antitrust enforcement perspective should be evaluated. The memo should also briefly describe the proposed course of the investigation, including the estimated duration, anticipated developments, and important (or even dispositive) issues; the attorneys to be assigned to the investigation should also be listed. If the request is based on a Hart-Scott-Rodino filing, the date on which the initial waiting period expires should be included. PI memos may vary somewhat depending on the type of case,[3] and exemplars may be

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[2] For procedures when the parties initiate contact with the Division, see infra Section D.2.f.

[3] For instance, a merger PI memo would discuss the following: the transaction itself (including any complaints received or concern expressed in the press); theor(ies) of competitive harm; possible product market(s); possible geographic market(s); best estimate of market shares; ease or difficulty of

obtained from the appropriate Special Assistant.

In the case of a potential criminal violation, there are sometimes situations where the staff has already developed sufficient information to request authority to conduct a grand jury investigation. In these circumstances, the staff may bypass preliminary inquiry authority and simply request grand jury authority. (The process for requesting grand jury authority is discussed further in Section F, infra.)

The PI Request Memo is forwarded (typically by e-mail) to the section, task force, or field office Chief. The Chief then reviews the request. If the Chief approves, then the PI Request Memo is e-mailed to the "PI Request" mailbox and to the Special Assistant responsible for the component. (If the PI Request originates from a predominantly criminal section (a field office or the Lit I section), the e-mailed PI Request memo should also be addressed to the CRIM-ENF mailbox.) At the same time the PI Request memo is sent forward, an "AMIS New Matter Form" (ATR 141) should also be sent to the Premerger Notification Unit/FTC Liaison Office (by e-mail to the AMIS mailbox). See Division Directive ATR 2810.1 "Antitrust Management Information System (AMIS)" for instructions on the completion of this form.

Once a PI Request Memo is received in the PI Request mailbox, clearance is requested from the FTC. (This process is discussed in more detail in Chapter VII, Section A.). The Premerger Notification Unit/FTC Liaison Office notifies the requesting section, task force, or field office when clearance is granted. Absent special circumstances, the Division component seeking the PI will receive the assignment after FTC clearance is received. Special circumstances include special expertise by another section, task force, or field office or resource problems in a section, task force, or field office at a particular time.

The Premerger Notification Unit/FTC Liaison Office transmits a copy of the PI Memo to the Economic Analysis Group ("EAG") at the time clearance is requested, and notifies EAG, along with the requesting legal component, when clearance is granted. (For all significant civil non-merger PI requests, EAG should have been informally consulted by the section, task force, or field office prior to the forwarding of the PI request to the PI Request mailbox.) The Chief of the EAG section to which the matter is referred then assigns an economist. The assigned economist will work with the legal staff on all matters requiring economic or statistical analysis.

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entry and potential barriers; possible efficiencies; significance of the matter (including any unusual reasons to pursue or not pursue it); the initial investigative approach; and the outcome of any past investigations in the industry.

3. FTC Clearance Procedure

All requests for authority to initiate a new investigation are cleared with the Federal Trade Commission. The Premerger Notification Unit/FTC Liaison Office requests FTC clearance for each new investigation when the preliminary inquiry memo is submitted to the PI Request mailbox. If the FTC raises questions concerning the request, the staff may be asked to provide more detailed information.

Where time is of the essence, it is important to submit a PI request immediately if a section, task force, or field office wishes to conduct an investigation. In special circumstances such as a cash tender offer in a merger matter, or upcoming opportunities to conduct consensual monitoring in a potential criminal investigation, the Chief or Assistant Chief should immediately contact the appropriate Special Assistant by telephone, by e-mail, or in person so that expedited clearance can be requested from the FTC. When FTC clearance is granted and when the investigation is opened, the Premerger Notification Unit/FTC Liaison Office will inform the section, task force, or field office so that the investigation may begin. If staff does not receive any information concerning clearance within a week after submitting a PI Request Memo, it should contact the Division's FTC Liaison Officer (the Senior Special Assistant) and inquire.

The Division's clearance and liaison procedures with the Federal Trade Commission are described fully in Chapter VII, Section A.

4. Referral of a Matter to Another Prosecutorial Agency

Sometimes, a particular matter should more properly be investigated by another federal agency or a state or local prosecutorial agency rather than the Antitrust Division. If the matter involves an issue that is not of direct antitrust significance, it may be referred to an appropriate state or local agency, e.g., a state consumer protection agency.

If the matter is an antitrust matter that is localized, or involves a relatively small amount of commerce, the Division may refer the matter to the antitrust section of the appropriate state attorney general's office. When such a referral is under consideration, the appropriate Director of Enforcement and Senior Counsel to the Assistant Attorney General (or other person in charge of state liaison) should be consulted.

When a referral to another agency is made, the Chief of the section, task force, or field office should prepare a letter to the appropriate state or federal official, setting forth the facts that have been developed, asking the official to express the agency's interest in the matter, and requesting that the official inform the Division of acceptance or rejection of the referral. In all cases, the letter should be a self-contained document and should never be a copy of internal Division memoranda or work product. It should include any documentation the Division has received, to the extent that disclosure is advisable

and not precluded by law. A copy of each referral letter should be sent to the appropriate Director of Enforcement.

If the staff attorney or Chief of the section, task force, or field office has a question regarding a particular referral, he or she should consult with the Special Assistant responsible for the component.

C. Conducting the Preliminary Inquiry

When preliminary inquiry authority is requested, the staff, in consultation with the Chief, should plan the investigation considering time limitations. Although each investigation will be different from any other, certain general principles apply to assist the staff in (a) allocating resources effectively; (b) obtaining useful documentary and testimonial evidence; and (c) using the services and technical resources of the Division. See infra Chapter VI, Section B.

1. Planning the Investigation

At the beginning of any investigation, the staff should immediately determine the scope and focus of its investigative effort. Planning sessions should take place at the time the preliminary inquiry request is being processed. At this stage, the Chief and the legal and economic staff should establish a plan describing what is to be done, and how and when it will be done, and who will do each task.

For example, in a civil investigation thought should be given as to how best to elicit different types of needed information--from interviews, depositions, documents, or interrogatories--as well as what economic evidence, and what support from EAG, is needed. This investigative plan should also provide for early development of the legal and economic theory to be relied upon and a determination of the relief to be sought. The key premise of the plan is that from the outset of an investigation the staff's theory of the case should be well-defined, although it is expected that the theory of the case will be refined as the investigation proceeds. In most instances, this plan should include the drafting of an outline of proof. An outline of proof is a living document prepared jointly by the legal and economic staff that should be revised regularly as the factual underpinnings of the case come into focus. For civil non-merger cases, this outline will normally start with a recommendation outline and end in findings of fact. In merger cases, it should provide the evidence for each element of the merger Guidelines with highlights from the best documents, depositions, or affidavits. It should also include an evaluation of the defendant's evidence and legal and economic theories. Another tool, the case agenda, becomes more important as staffs grow. The case agenda can take one of two forms, the calendar model or the to-do list model. In some cases both may be usefully employed.[4] Software packages are available that can assist with the outline of proof and case agenda.

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[4] Exemplars are set forth in the Division's Civil Litigation Manual, a compilation of many "best practices" in civil litigation from the investigation period through the pretrial process.

Resources available to the staff in beginning the investigation are outlined in Chapter VI, Section B, the Guide to Conducting Antitrust Investigations. The Guide analyzes and defines the Division's investigatory techniques and procedures in detail, including use of economic resources, data processing and other information retrieval methods, and other source materials generally found useful in investigation and litigation efforts.

2. Obtaining Assistance from Federal Agencies

During the course of the preliminary inquiry, the staff may require assistance in conducting interviews of industry officials, locating individuals whose whereabouts are unknown, compiling statistical data, or performing various other investigative functions. When such assistance is necessary, the staff should consider requesting the services of other federal agencies.

a. Federal Bureau of Investigation

To obtain FBI assistance, the staff, with the concurrence of the Chief, should prepare a memorandum from the Director of Criminal Enforcement, Antitrust Division, to the Chief, White Collar Crime Section, Criminal Investigative Division, Federal Bureau of Investigation. The memorandum should be in outline form covering the following six elements:

I. Introduction. A brief introductory paragraph consisting of (a) a general description of the investigation; (b) the geographic area(s) of the investigation; (c) the type(s) of assistance the FBI is being asked to provide; and (d) the name(s) and telephone number(s) of the Division attorney(s) with whom the assigned agent should consult.

II. Synopsis of Allegations. A synopsis of the allegations, including the basis for initiating an investigation and a listing of the corporate and individual subjects of the investigation with identifying information, e.g., location and position.

III. Possible Federal Violations. A listing of the specific Federal statutes that may have been violated or may be charged if evidence is developed to support the allegations.

IV. Judicial District. The judicial district where charges would be filed if evidence is developed to support the allegations.

V. Other Investigatory Agencies. The involvement of any other investigatory agencies that have participated or may participate in the investigation.

VI. Conclusion. A brief statement confirming that if the FBI is successful in developing evidence to support the filing of charges, the Department will prosecute the matter.

The memorandum should be sent via e-mail to the CRIM-ENF mailbox with a cc to the appropriate Special Assistant. The memo is reviewed by the Special Assistant responsible for the requesting office and given to the Director of Criminal Enforcement for review and approval before being forwarded to FBI Headquarters. Once FBI Headquarters has processed the request and assigned it to the appropriate FBI office (a routine request takes about 10 working days), the agent or agents assigned to the matter will contact the staff directly and begin the investigation. After the initial request is made and an agent is assigned, further requests for assistance may be made directly to the assigned agent.

If staff requires FBI assistance to perform a criminal records search in connection with trial preparation and the FBI has not previously participated in the investigation of the matter, then a memorandum from the Director of Criminal Enforcement, Antitrust Division must be sent to the Chief, White Collar Crime Section, Criminal Investigative Division, Federal Bureau of Investigation. The memorandum should include the following information:

I. Introduction. A statement requesting assistance in conducting a criminal records check of defendant(s) and potential witnesses in connection with a trial. The statement should include the following information: the name of the case, criminal number, and district; the date the trial is expected to begin; the date the results of the FBI check are needed; and the name and phone number of the contact person at the Division.

II. The Indictment. A brief statement of the charges in the indictment and when the indictment was returned.

III. Identifying Information. A list of the defendants first and then the witnesses (each in alphabetical order) with the following identifying information: name; address; country of citizenship; social security number; and date of birth. (Note: If the defendant(s) is a company, please indicate after the company name the name of a high-ranking official -- owner, president, CEO, etc. -- with the identifying information listed above for that person.)

Any questions about FBI assistance should be referred to the Special Assistant responsible for the requesting office. A sample FBI assistance memo follows:

Memorandum

Subject Request for FBI Assistance in (insert commodity) Investigation	Date

To Chief, White Collar Crime Section
Criminal Investigative Division
Federal Bureau of Investigation

Attn: (name)
Chief, Governmental Fraud Unit

From (Name)
Director of Criminal Enforcement
Antitrust Division

I. Introduction

The Antitrust Division is conducting an investigation of price fixing among the major distributors in Yakima, Washington of ..... We request FBI assistance on all phases of the investigation. Initially, we request agent assistance in interviewing possible witnesses. Joe Blow and Jane Doe, trial attorneys in the San Francisco Field Office (415) 436-6660, have been assigned to this matter.

II. Synopsis Of Allegations

On interview, ..., provided the following evidence of possible price fixing on ..... in Yakima, Washington:

Subjects of the investigation include:

Corporations
Name and location(s)

Individuals
Name, address, corporate affiliation, position,

III. Possible Federal Violations

The conduct alleged here could possibly be prosecuted under 15 U.S.C. § 1 and 18 U.S.C. § 1341 or 18 U.S.C. § 1343.

IV. Judicial District

Any charges arising from this investigation would likely be filed in the Eastern District of Washington in Yakima.

V. Other Investigatory Agencies

We do/ do not anticipate that any other investigatory agencies will participate in the investigation of this

matter.

VI. Conclusion

FBI support would be of substantial assistance to the Department in investigating this alleged violation. Of course, if the FBI is successful in developing evidence to support the filing of charges, the Department will prosecute the matter.

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b. Other Federal Agencies

If an investigation involves procurement by a federal agency such as the Department of Defense, staff should consider seeking the assistance of the Inspector General's Office for the particular agency. IG agents have in the past proven to be very helpful in collecting and analyzing bid or pricing data, in interviewing potential witnesses, and in helping Division attorneys to understand a particular agency's procurement system and regulations. No special Division procedures are required for obtaining the assistance of IG agents, and each section, task force, or field office should make whatever arrangements are appropriate directly with the Inspector General's office for the agency involved. If questions or problems arise, however, staff should discuss the matter with the appropriate Director or Deputy Assistant Attorney General.[5]

3. Obtaining Information by Voluntary Requests

During the preliminary inquiry stage, Antitrust Division staffs often rely upon voluntary requests for information--both in the form of interviews and requests for documents--from the potential subjects of the investigation, other companies within the industry, customers, trade associations and other sources. Voluntary requests may be useful to keep communications less formal, avoid the adversarial tone injected by use of compulsory process, and speed collection of useful information. Although reliance on voluntary requests to obtain documentary evidence has become less common in recent years, it is still an alternative to be considered by the staff in developing and implementing its investigative strategy.[6]

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[5] Special procedures exist for dealing with the Department of Defense on defense-related mergers or teaming arrangements. See Chapter VII, Section E.2 (discussing these procedures). Staff should contact the Director of Merger Enforcement before initiating contact with the Department of Defense on any merger matter.

[6] Until 1976, reliance on voluntary information was in part necessitated by limitations on the Division's power to issue compulsory process at the pre-complaint stage of a civil proceeding. The passage of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 expanded the Division's

a. Considerations In Using Voluntary Information Requests

While there are no firm rules to guide Division attorneys in deciding whether to use a voluntary request or a CID in seeking documents and other information, some guidelines may be of assistance. Generally, when a large volume of documents is sought, it is best to proceed by compulsory process. The formalities of compulsory process are better designed to ensure full and timely compliance with an extensive request than the less formal procedures of the voluntary request. Additionally, where an investigation may result in an application for a preliminary injunction, use of CID process should normally be employed to avoid the possibility that voluntary cooperation may cease or that production of requested documents may be delayed so long that it interferes with the government's ability to present a strong case for preliminary relief.

b. Confidentiality Considerations

Information that is not produced in response to a CID or as part of the HSR process (including information revealed in an interview conducted in lieu of a CID deposition) is not protected by the statutory provisions of the CID or HSR statutes.[7] Accordingly, parties will often seek written confidentiality assurances that the information they submit will be protected from disclosure under the Freedom of Information Act ("FOIA") or that they will be given advance notice if such disclosure is contemplated. It is not uncommon for the Division to provide a "confidentiality letter," particularly for interviews, at the request of parties in order to expedite an investigation.

Assurances of confidentiality and notice normally should not exceed those established by Department regulation. See 28 C.F.R. § 16.8. Any assurances of confidentiality or notice should cover only information that the submitter has in good faith designated as confidential and should be limited to a reasonable time period. Further, the assurance should never guarantee absolute confidentiality, but rather should bind the Division only as to what action it will take in its initial response to a Freedom of Information Act request.[8] FOIA disclosure of non-CID, non-HSR information by

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authority to issue civil investigative demands ("CIDs"). Section E of this Chapter contains a full explanation of the Antitrust Civil Process Act.

[7] Among other things, documents and other information produced pursuant to a CID are exempt from disclosure under the Freedom of Information Act. See 15 U.S.C. § 1314(g); see also infra Section E.6 (discussing, in depth, CID confidentiality protections).

[8] Binding assurances concerning what will or will not be disclosed in the event of a Freedom of Information Act request cannot be made because the final decision as to disclosure may not be the

DOJ is governed by 28 C.F.R. § 16.8.[9] Such information receives considerable protection from FOIA disclosure under exemption (b)(4) (regarding confidential business information). For the regulation and exemption to apply, parties should request confidential treatment and identify confidential documents. The typical Division confidentiality letter states that the Division will treat information that they provide as business information for purposes of 28 C.F.R. § 16.8, that the Division will act in accordance with our stated policy (28 C.F.R. § 16.8), and that the Division will assert all applicable exemptions to disclosure.[10] See infra Chapter VI, Section G (describing FOIA procedures and exemptions).

A typical confidentiality letter reads as follows:[11]

Division's. See Chapter VII, Section G (providing a discussion of the Freedom of Information Act).

[9] On occasion, private counsel have asserted to Division attorneys that information being provided by their clients to the Division is not subject to disclosure under FOIA because it is confidential under the Trade Secrets Act, 18 U.S.C. § 1905, a criminal statute prohibiting the disclosure of confidential information by government personnel. As a general rule, the proper scope of the Trade Secrets Act is no greater than the confidentiality protection of FOIA, but there has been some confusion in the case law on that issue. Accordingly, the Assistant Attorney General for the Criminal Division has announced that the Criminal Division will not prosecute government employees for a violation of 18 U.S.C. § 1905 if the release of the information in question was made in a good faith effort to comply with FOIA and the applicable regulations. See United States Attorney's Manual § 9-2.025.

[10] Under current case law, information voluntarily provided to the Division in connection with an investigation may be exempt from disclosure under the Freedom of Information Act. See Critical Mass Energy Project v. NRC, 975 F.2d 871, 879 (D.C. Cir. 1992) (en banc), cert. denied, 507 U.S. 984 (1993). The case law recognizes that where the government receives information on a voluntary basis, the disclosure of that information could interfere with the government's ability to obtain such information on a voluntary basis in the future, and accordingly, the information may be withheld from disclosure under FOIA, provided it is information that is not customarily disclosed to the public by the submitter. This is based on a recognition of the advantages to the government of voluntary compliance as opposed to sometimes cumbersome compulsory process such as civil investigative demands. The government may withhold this information from disclosure under FOIA even though it might have used compulsory process to obtain the documents had they been submitted voluntarily. See id. at 878-80. Information that is relevant to an ongoing investigation or information that would identify a confidential source may also have additional protections under FOIA. See Chapter VII, Section F.

[11] Should staff wish to provide assurances that differ significantly from those contained in this model letter, the FOIA Unit and appropriate Director of Enforcement should be consulted prior to any assurances being made.

Dear Mr./Ms. Lawyer:

You have requested a statement regarding the United States Department of Justice's ("Department") treatment of sensitive information which it may receive from your client in response to our request for the voluntary production of information, including information provided in an interview and/or memorialized in voluntarily produced documents. It is in the Department's interest to protect the confidentiality of sensitive information provided by its sources, and to prevent competitively sensitive information from being shared among competitors. Accordingly, sensitive information will only be used by the Department for a legitimate law enforcement purpose, and it is the Department's policy not to disclose such information unless it is required by law or necessary to further a legitimate law enforcement purpose. In the Department's experience, the need to disclose sensitive material occurs rarely.

Sensitive information includes "confidential business information" which means trade secrets or other commercial or financial information (a) in which the company has a proprietary interest or which the company received from another entity under an obligation to maintain the confidentiality of such information, and (b) which the company has in good faith designated as confidential. The Department's policy with regard to confidential business information is to treat it, for ten years, in the manner set forth in this letter.

In the event of a request by a third party for disclosure of confidential business information under the Freedom of Information Act, the Department will act in accordance with its stated policy (see 28 CFR § 16.8, a copy of which is enclosed) and will assert all applicable exemptions from disclosure, including those exemptions set forth in 5 U.S.C. §§ 552(b)(4), (b)(7)(A) and (b)(7)(D) (to the extent applicable). See also Critical Mass Energy Project v. Nuclear Regulatory Commission, 975 F.2d 871, 880 (D.C. Cir.1992) (voluntarily submitted financial or commercial information not customarily released to the public is protected), cert denied, 507 U.S. 984 (1993).

In the event of a request by a third party for disclosure of any appropriately designated confidential business information under any provision of law other than the Freedom of Information Act, it is the Department's policy to assert all applicable exemptions from disclosure permitted by law. In addition, the Department's policy is to use its best efforts to provide the company such notice as is practicable prior to disclosure of any confidential business information to a third party who requests it under any provision of law other than the Freedom of Information Act.

Although it is the Department's policy not unnecessarily to use sensitive information in complaints or court papers accompanying a complaint, which are publicly available documents, the Department cannot provide an absolute assurance that sensitive information will not be included in such documents. If a complaint is filed, it is the Department's policy to notify your client as soon as is reasonably practicable of any decision by the Department to use confidential business information for the purpose of seeking preliminary relief. Our policy is generally to file under seal any confidential business information used for such purpose and advise the court that your client has designated the information as confidential. Moreover it is the Department's policy to make reasonable efforts to limit disclosure of the information to the court and outside counsel for the other parties to the litigation until your client has had a reasonable opportunity to appear before the court and, if your client appears, until the court has ruled on its application. To that end, it is the Department's policy not to oppose a court appearance by your client for the purpose of seeking protection for the confidential business information used, or to be used, during the preliminary relief proceedings.

If confidential business information becomes the subject of discovery in any litigation to which the Department is a party, it is the Department's policy to use its best efforts to assure that a protective order applicable

to the information is entered in the litigation. In addition, our policy is to not voluntarily produce the confidential business information until your client has had a reasonable opportunity to review and comment on the protective order and to apply to the court for further protection. It is the Department's policy not to oppose a court appearance by your client for this purpose.

Please do not hesitate to call me at (zzz) xxx-yyyy if you have any questions.

Sincerely yours,

Pat Attorney

The administrative burdens involved in complying with non-statutory assurances of confidentiality or advance notification, sometimes years later, are not easily managed, particularly when documents are involved. For this reason, in the case of documents, staffs should carefully consider whether to use a confidentiality letter; a CID is usually preferable. (In either case, parties should mark the appropriate documents "confidential" and indicate a period of time for which confidential treatment is requested, recognizing that such designations are not binding on a court.)

On occasion, the Division has encouraged cooperating third parties or subjects to give us documents "in anticipation of a CID" and then issued a CID specifying the documents shortly thereafter. Although this is not the preferred practice since the extent of protection this offers has not been tested in the courts, it can be used when there is a need to get the documents expeditiously.

Parties frequently want to produce "white papers" discussing aspects of an investigation. If they desire CID protection, the Division can issue a CID either with an interrogatory asking for their views on whatever is contained in the white paper, or a CID with a single document request identifying the white paper by name and date. In the case of an interview, a CID is not possible without converting the interview into a deposition--which may not be desirable. Accordingly, a confidentiality letter may be the only option in some situations.

Ultimately, if the recipient of a voluntary request declines to furnish information absent the usual assurances of confidentiality, the better practice is usually for the staff attorney to prepare a CID compelling the production of the desired documents or information.

4. Status Reports on Investigations

In addition to the reporting requirements of AMIS, a periodic update on the progress of each investigation is given at the section's, task force's, or field office's periodic status meeting with the Deputy Assistant Attorney General responsible for that component and the appropriate Director of Enforcement. These status meetings are designed to monitor the progress of each investigation and to

discuss the legal and economic theories underlying the investigation. In addition to these meetings, special status meetings are held for individual investigations at critical points. Ordinarily, staff should prepare an updated order/outline of proof and case agenda for presentation and distribution at such meetings.[12]

5. Standards for Determining Whether to Proceed By Civil or Criminal Investigation

On its face, Section 1 of the Sherman Act, 15 U.S.C. § 1, makes any contract, combination or conspiracy in restraint of trade a criminal offense. In addition, the Department of Justice has the authority to bring equitable actions to prevent and restrain all antitrust violations. See 15 U.S.C. §§ 4, 25. This section provides guidance on when it is appropriate to begin an investigation of a suspected antitrust violation using criminal process and, alternatively, when civil process should be employed.

Many investigations that are conducted by the Antitrust Division are by their very nature civil investigations, e.g., merger investigations. Nevertheless, there are some situations where the decision to proceed by criminal or civil investigation requires considerable deliberation. In general, current Division policy is to proceed by criminal investigation and prosecution in cases involving horizontal, per se unlawful agreements such as price fixing, bid rigging and horizontal customer and territorial allocations. Civil process and, if necessary, civil prosecution is used with respect to other suspected antitrust violations, including those that require analysis under the rule of reason as well as some offenses that historically have been labeled "per se" by the courts. There are a number of situations where, although the conduct may appear to be a per se violation of law, criminal investigation or prosecution may not be considered appropriate. These situations may include cases in which: (1) there is confusion in the law; (2) there are truly novel issues of law or fact presented; (3) confusion reasonably may have been caused by past prosecutorial decisions; or (4) there is clear evidence that the subjects of the investigation were not aware of, or did not appreciate, the consequences of their action.

During the preliminary inquiry stage of the investigation, the staff makes the determination on whether to conduct the remainder of the investigation as a grand jury, CID, or Second Request investigation. In general, however, the nature of the suspected underlying conduct should determine the nature of the investigation. Thus, when the conduct at issue appears to be conduct that the Division generally prosecutes in a criminal case, the investigation should begin as a criminal investigation absent clear evidence that one of the complicating factors that might make the case inappropriate for criminal prosecution is present. Where it is unclear whether the conduct in question would be a civil or criminal violation, the relevant Director of Enforcement should be consulted before any decision is made concerning the nature of the investigation. Among other things, early Front Office involvement might result in a decision that certain conduct is inappropriate for criminal prosecution. Alternatively, the staff

[12] See supra Section B.1.

might be instructed to continue its preliminary investigation but to focus on facts that might be relevant in determining whether a grand jury should be convened.

The decision to convene a grand jury has several consequences, including restrictions on how the government can use certain evidence gathered during the course of the grand jury's investigation. For example, in United States v. Sells Engineering, Inc., 463 U.S. 418 (1983) and United States v. Baggot, 463 U.S. 476 (1983), the Supreme Court restricted the government's ability to use evidence gathered during the course of a grand jury investigation in a subsequent civil case. In Sells, the Court held that Fed. R. Crim. P. 6(e) prohibits the disclosure of grand jury materials to Department of Justice attorneys who were not involved in the grand jury proceedings unless the government obtains a court order based on a showing of particularized need. However, the Court expressly declined to address "any issue concerning continued use of grand jury materials, in the civil phase of a dispute, by an attorney who himself conducted the criminal prosecution." 463 U.S. at 430 n.15.

The issue left unresolved in Sells was considered in In re Grand Jury Investigations, 774 F.2d 34 (2d Cir. 1985). In that case, the Second Circuit held that the general secrecy concerns discussed In Sells compelled it to conclude that a Rule (6)(e) order was required before the Antitrust Division attorneys who had conducted a grand jury investigation could be allowed continued access to grand jury materials during any subsequent civil case. The Supreme Court reversed, holding that an attorney who conducted a criminal prosecution may make continued use of grand jury materials In the civil phase of the dispute without obtaining a court order to do so under Rule 6(e), holding that "Rule 6(e) does not require the attorney to obtain a court order before refamiliarizing himself or herself with the details of a grand jury investigation." United States v. John Doe, Inc. I, 481 U.S. 102, 111 (1987).[13]

6. Evaluating the Results of a Preliminary Inquiry

The normal period of time required to conduct a preliminary inquiry ranges from a few weeks to a few months. After this period, the staff should be prepared to proceed by further voluntary requests, by CID, by Second Requests, by grand jury, or to close the investigation.

In making this determination, the staff should consult with the section, task force, or field office Chief and the relevant EAG Chief to discuss the results of the investigation. In many investigations, the next step In the investigation will be relatively clear; however, In others the decision whether to continue the investigation will require deliberation and consultation. If there are questions that remain to be resolved, the section or field office Chief may wish to consult informally with the relevant Director of Enforcement before making a recommendation.

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[13] The Antitrust Division Grand Jury Practice Manual should be consulted for a more complete discussion of Rule 6(e) issues including the Sells and Doe decisions.

The staff recommendation to proceed by grand jury investigation or by CID investigation must be processed through the appropriate Director of Enforcement and the appropriate Deputy Assistant Attorney General, and such investigations require the approval of the Assistant Attorney General.[14]

7. Closing an Investigation[15]

If, after analysis of the conduct or transaction, the staff and the Chief believe that the matter should not be investigated further, staff should prepare a memorandum recommending that the investigation be closed. If a separate memorandum will not be submitted by the economist assigned to the matter, the legal staff's memorandum should state whether the economist concurs In the recommendation to close. If the Chief concurs, the recommendation is e-mailed to the Special Assistant responsible for the component. The appropriate Director of Enforcement will review the memo and either close the investigation or request additional information or investigation. At the time the closing memo is e-mailed to the appropriate Special Assistant, an AMIS "Matter Modify/Close Form" should be sent to the Premerger Notification Unit/FTC Liaison Office by e-mail.

After the decision is made to close the investigation, the section, task force, or field office will receive back a copy of the closing memo indicating what date the matter was closed. The staff should then notify the subjects of the investigation that the matter is closed,[16] close its file on the matter, and process all documentary material received during the investigation in accordance with the provisions of Division Directive ATR 2710.1, "Procedures for Handling Division Documents." In the event that staff needs to know quickly when a matter has been closed, it should call the appropriate Special Assistant or the Premerger Notification Unit/FTC Liaison Office.

D. Conducting a Merger Investigation

The Antitrust Division investigates proposed mergers and acquisitions to determine whether they may substantially affect competition and violate Sections 1 or 2 of the Sherman Act, 15 U.S.C. §§

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[14] Case recommendation procedures are discussed In Section G infra.

[15] See Section D.1.e, infra, for additional procedures on early terminations under the Hart-Scott-Rodino Act.

[16] In a criminal matter, staff should provide written notification of closure to any company In the subject industry that submitted documents to the Division pursuant to a grand jury subpoena or whose documents were seized pursuant to a search warrant, as well as to any company or individual who has been notified by the Division that the company or individual was a "target" of the investigation. At the staff's discretion, other appropriate persons, such as cooperating witnesses or victims, may also be notified.

1-2, or Section 7 of the Clayton Act, 15 U.S.C. § 18. In determining whether a merger is anticompetitive, staff should apply stated Division merger enforcement policy. The Division's enforcement policy concerning horizontal mergers is articulated in the joint U.S. Department of Justice/Federal Trade Commission ("FTC") Horizontal Merger Guidelines, released in 1992, revised in 1997, and reprinted in Chapter II. Division policy on vertical mergers is found in the U.S. Department of Justice Merger Guidelines released in 1984. Other sources of Division policy are the public statements of responsible officials.

The great majority of mergers and acquisitions do not raise serious competitive issues and staff should endeavor to review these transactions as expeditiously as possible. When investigating transactions that raise significant competitive issues, staff should always keep in mind its dual role: staff must determine whether a merger or acquisition may substantially affect competition and also must obtain sufficient evidence to successfully challenge an anticompetitive transaction. Portions of this section discuss how merger investigations should be structured to fulfill these goals.

Most significant mergers and acquisitions must be reported to the Division and the FTC before they occur. The premerger notification provisions of Section 7A to the Clayton Act, 15 U.S.C. § 18a, enacted as part of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, require enterprises exceeding certain thresholds to notify the Division and the FTC of the proposed transaction, submit documents and other information to the agencies concerning the transaction, and refrain from closing the transaction until a specific waiting period has expired. Since most of the Division's merger investigations will be conducted under the provisions of the Act, the structure of the Act provides the basic structure for merger investigations and attorneys should be familiar with the provisions of the premerger notification statute and rules that implement it.

1. A Basic Guide to the Premerger Notification Statute and Rules

This section describes the premerger notification procedures employed by the Division and FTC. Title II of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR"), 15 U.S.C. § 18a, requires parties to certain mergers or acquisitions to notify both the Division and the FTC before consummating the proposed transaction and to submit certain information to both agencies. After notification, the parties must wait a specified time, usually 30 days (15 days for cash tender offers or bankruptcy sales[17]), before the transaction can be consummated. The statute also allows the

[17] The Bankruptcy Reform Act of 1994, which amends § 363 of the Bankruptcy Code, provides in part that the waiting period required for transactions involving an acquired person in bankruptcy be 15 days. The provision applies to entities that filed for bankruptcy on or after October 22, 1994. See Bankruptcy Reform Act, Pub. L. No. 103-394, sec. 109, § 363(b)(2), 108 Stat. 4106 (1994). For entities that filed for bankruptcy prior to that date, the waiting period is 10 days.

enforcement agencies to make a request for additional information which extends the waiting period.

The statute grants broad rulemaking authority to the FTC, with Division concurrence, to implement Title II. The Rules, Regulations, Statements and Interpretations under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("Rules") are codified at 16 C.F.R. §§ 801-803. Questions regarding specific aspects of the Rules should be directed to the Legal Policy Section, the Premerger Notification Unit/FTC Liaison Office, or the appropriate Special Assistant. Attorneys may wish to consult the FTC's publication entitled Premerger Notification Source Book which contains the Act, the Rules, and their accompanying Federal Register Statements of Basis and Purpose and formal interpretations. The Source Book is available from the Antitrust Library. See also ABA Section of Antitrust Law, The Merger Review Process (1995).

This section sets forth the basic rules with which attorneys conducting merger investigations should be familiar. The complete text of the Act and Rules should be consulted for specific information. Staff should generally not attempt to answer questions from the public about the reportability of particular transactions, filing mechanics, and filing fees. Such questions should be directed to the FTC Premerger Notification Office (telephone number (202) 326-3100).

a. Determining Whether the Act Applies

(i) Tests

There are three tests, all of which must be met, in order for a transaction to be reportable:

(a) commerce test -- either the acquiring or the acquired person must be engaged in commerce or in any activity affecting interstate commerce;[18]

(b) size-of-person test -- generally, one party to the transaction must have annual sales or assets of at least $100 million and the other party $10 million;[19] and

(c) size-of-transaction test -- as a result of such acquisition, the acquiring person must hold (1) voting securities or assets worth in the aggregate more than $15 million; or (2) voting securities which confer control (50%) of an issuer with annual sales or total

[18] See § 7A(a)(1) of the Act, 15 U.S.C. § 18a(a)(1).

[19] See § 7A(a)(2) of the Act, 15 U.S.C. § 18a(a)(2). When the acquired person is not engaged in manufacturing and does not have at least $100 million of sales or assets, then it must have assets (not sales or assets) of at least $10 million. See § 7A(a)(2)(B), 15 U.S.C. § 18a(a)(2)(B).

assets of $25 million or more.[20]

(ii) Definitions

Part 801 of the Rules defines the statutory terms in these tests and the methods for calculating whether the "size-of-person" and "size-of-transaction" tests are met.

The definition of "person," "entity," and "ultimate parent entity" in Section 801.1(a), the definition of "control" in Section 801.1(b), and the definition of "hold" in Section 801.1(c) of the Rules will be particularly important in making these determinations.

(iii) Calculating the Thresholds

Section 801.11 explains how to calculate whether the "size-of-person" test is met. Section 801.10 and 801.12 of the Rules explain how the percentages and valuation tests are performed to determine whether the "size-of transaction" test is met.

(iv) Special Types of Transactions

Part 801 also contains a series of rules dealing with special types of transactions. Section 801.4 explains the concept of "secondary acquisitions." Whenever as a result of an acquisition ("the primary acquisition"), an acquiring person will obtain control of an entity that holds voting securities of another entity which it does not control, then that second aspect of the acquisition (the secondary acquisition) is separately subject to the Act and the Rules under Section 801.4.

Section 801.30 provides that the waiting period begins for certain types of acquisitions when the acquiring person files.[21] Among the seven types of transactions afforded this special treatment under Section 801.30 are: (a) acquisitions of voting securities on a national securities exchange or "over the counter," (b) acquisition of voting securities by means of a tender offer, (c) acquisitions (other than mergers and consolidations) in which voting securities are acquired from someone other than the issuer or related entity, and (d) secondary acquisitions. For all other acquisitions, the waiting period does not begin until all persons required to file have filed.

Section 801.32 makes clear that conversion of convertible voting securities is a potentially

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[20] See § 7A(a)(3) of the Act, 15 U.S.C. § 18a(a)(3). This section must be read together with Rule 802.20(b), 16 C.F.R. §820.20(b).

[21] The acquired person in such transactions is required to file within 15 days (10 days in the case of cash tender offers).

reportable acquisition under the Act. Section 801.40 establishes the reporting scheme for formation of new corporations, particularly new corporate joint ventures. Under Section 801.40(a), each contributor to the corporate joint venture is deemed an acquiring person, and the corporation itself is deemed an acquired person. Section 801.40(b) contains its own "size-of-person" tests applicable to any transaction (except in connection with a merger or consolidation) in which a new corporation is formed, provided that the criteria of the commerce and "size-of transaction" tests are satisfied. A special rule for determining the total assets of the new corporation is stated in Section 801.40(c), and a special rule relating to the commerce test of § 7A(a)(1) of the Clayton Act, 15 U.S.C. § 18a(a)(1), is contained in Section 801.40(d).

b. Exemptions to the Reporting Requirements

Exemptions to the reporting scheme are found in §§ 7A(c)(1) through (c)(11) of the Clayton Act. See 15 U.S.C. §§ 18a(c)(1)-(11). These statutory exemptions include:

(1) Acquisitions of goods and realty in the ordinary course of business;

(2) Acquisitions of non-voting securities;

(3) Acquisitions of voting securities, solely for the purpose of investment, if as a result of such acquisition the acquiring person does not hold more than 10% of the voting securities of the issuer;

(4) Transactions which require agency approval under certain statutes, such as the Bank Holding Company Act (in certain cases, material submitted to the agency must be filed with the FTC and the Antitrust Division 30 days before consummation);

(5) Transfer to or from a federal agency or a state or a political subdivision thereof;

(6) Transactions specifically exempted from the antitrust laws; and

(7) Transactions specifically exempted from the antitrust laws if approved by a federal agency and if copies of all material submitted to such agencies are contemporaneously filed with the FTC and the Antitrust Division.

Part 802 of the Rules explains these exemptions and contains additional ones.[22] For example,

[22] The Act grants the FTC, with the concurrence of the Division, authority to exempt from premerger reporting classes of transactions that are not likely to violate the antitrust laws. See 15

Section 802.8 exempts certain supervisory acquisitions of savings and loan institutions. Section 802.20 is important in applying the size-of-transaction test, as it exempts some smaller acquisitions which would be reportable only because of the Act's 15 percent test. Section 802.21 exempts acquisitions of voting securities if a notification threshold will not be met or exceeded. (The notification thresholds are defined in Section 801.1(h).) Section 802.23 deals with renewed and amended tender offers. Section 802.30 exempts intra-enterprise transactions. Sections 802.50-.53 exempt many types of transactions dealing with foreign assets and/or foreign persons, often on the basis of limited nexus to United States commerce. Certain acquisitions by creditors, insurers, and institutional investors are also exempted by Sections 802.63-.64.

A new set of exemption rules were promulgated in 1996 for certain categories of transactions that the agencies believe, based on enforcement experience, are not likely to violate the antitrust laws. See Sections 802.1-.5. The new exemptions include certain real estate acquisitions, such as acquisitions of shopping centers, hotels and motels, and unless much higher thresholds are met, acquisitions of oil, gas, and coal reserves.

c. Filing Mechanics

Part 803 outlines the reporting procedures. The Notification and Report Form (Appendix to Part 803 of the Rules) must be completed in accordance with Section 803.1, and with the instructions appearing in Section 803.2 and on the form itself. Whenever the person filing notification is unable to supply a complete response to any item on the form, a statement of reasons for noncompliance must be supplied, in accordance with Section 803.3. Each Notification and Report Form must be accompanied by one or more affidavits and each form must be certified, as provided in Sections 803.5-.6 of the Rules.

In the special case in which a foreign-acquired person refuses to file notification, Section 803.4 may apply.

Section 803.7 provides that reported transactions must be consummated within one year following the expiration of the waiting period. If the reported transaction is not consummated within one year, an additional filing must be made and waiting period observed before the transaction may be consummated.

d. Waiting Period

Sections 7A(a) and (b) of the Clayton Act state that, where notification is required with respect

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U.S.C. § 18a(d)(2)(B).

to a contemplated acquisition of assets or voting securities, that transaction may not legally be completed until notification has been accomplished and a 30-day waiting period has thereafter expired (only 15 days is required in the case of a cash tender offer or a bankruptcy filing). The waiting period may be extended by issuance of a request for additional information,[23] as is described in Section D.1.f. infra. The request extends the waiting period until 20 days (10 days in the case of a cash tender offer or bankruptcy filing) after the parties comply with the request.

In some instances, parties have wanted to give the agencies additional time to determine whether to issue a request for additional information. This objective may be accomplished in some instances by withdrawal and nearly immediate resubmission of the acquiring person's HSR form. The FTC Premerger Notification Office (telephone (202) 326-3100) can provide details on how the parties may be able to re-start the waiting period in this manner without having to pay an additional filing fee.

Section 803.10(a) of the Rules explains when the waiting period begins, and Section 803.10(b) explains when it expires. It also addresses deficient filings. If the initial filing or second request response does not comply with the Rules, the filing person is to be notified promptly of the deficiencies. See infra Section D.2.c (discussing procedures in cases of deficiencies). When a filing complying with the rules is received the filing is deemed complete for purposes of triggering the running of the waiting period. Section 7A(b)(2) of the Clayton Act permits the FTC and the Assistant Attorney General in charge of the Antitrust Division to terminate the waiting period before it expires in certain cases.

e. Early Termination of the Waiting Period

Section 7A(b)(2) of the Clayton Act, 15 U.S.C. § 18a(b)(2), authorizes the FTC and the Antitrust Division to grant early termination of the Act's waiting period. A Formal Interpretation has been issued that describes the standards for early termination. Under the Formal Interpretation, early termination will normally be granted where (1) it has been requested in writing, (2) all parties have submitted their notification and report forms, and (3) both enforcement agencies have determined not to take enforcement action during the waiting period. In addition, early termination may be granted even absent a request in instances in which a Second Request has been issued. See 16 C.F.R. § 803.11(c).

All early terminations, regardless of when granted, must be cleared through the FTC and the Act requires that notice that early termination has been granted be published in the Federal Register.

(a) If no preliminary inquiry authority has been sought and the section, task force, or field office Chief and staff agree that early termination is appropriate, they should notify the Division's Premerger

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[23] A request for additional information to the target of a tender offer (whether or not a cash tender) does not extend the waiting period. See 15 U.S.C. §18a(e)(2); see also infra Section D.1.f.

Notification Unit/FTC Liaison Office promptly so that the response to the request may be relayed to the FTC without delay. See infra Section D.2.d(i) (describing the mechanics of this process).

(b) If the Division has opened a preliminary inquiry and the Chief and EAG concur in the staff's recommendation to grant early termination and to close the investigation, a memorandum should be e-mailed to the appropriate Special Assistant recommending early termination and closing. See supra Section C.7. Where time is critical, a conference call may be arranged. After the Director of Merger Enforcement closes the investigation, the Premerger Notification Unit/FTC Liaison Office will promptly relay the decision to grant early termination to the FTC. The Chief or staff must also submit an AMIS close form via e-mail to the Premerger Notification Unit/FTC Liaison Office by sending it to the AMIS mailbox.

(c) The procedures to be followed for granting early termination when requests for additional information have been issued, whether or not complied with, are exactly the same as those outlined in (b). Thus, staff should not withdraw the outstanding requests until the Division's Premerger Notification Unit/FTC Liaison Office has initiated the early termination procedures.

The FTC is responsible for notifying the parties that early termination has been granted by both agencies, even in situations where the investigation has been cleared to the Division. The FTC is also responsible for handling other procedural requirements, including Federal Register publication. Accordingly, if contacted by the parties, the staff should not advise them that the Division is willing to grant early termination, but rather should advise the parties to contact the FTC's Premerger Office (telephone (202)326-3100) for further information.

f. Request For Additional Information

Pursuant to Section 7A(e) of the Clayton Act, 15 U.S.C. § 18a(e), the Division or the FTC, but not both, may request additional information or documentary materials from any person required to file a notification (commonly referred to as a "Second Request") or from any officer, director, agent or employee of such person. A Second Request must be made prior to the expiration of the 30-day waiting period (or 15-day waiting period in the case of a cash tender offer or bankruptcy filing). A Second Request extends the waiting period before which the transaction may be consummated for twenty days (ten days in the case of a cash tender offer or an acquisition from a debtor in bankruptcy) from the time when both parties (or, in the case of any kind of tender offer, the acquiring person) have substantially complied with the Request.[24] As discussed further below, the Division and FTC have

[24] Where the transaction is any kind of tender offer, the Second Request to the acquired person does not extend the waiting period, which expires ten days (cash tenders) or twenty days (other tenders) after the acquiring person has substantially complied with the Second Request, even if the

agreed to a model Second Request schedule that increases consistency and reduces compliance burdens on parties. See infra Section D.3.b(i).

A Second Request is effective if it is received within the original waiting period by the party filing notification or if notice of the issuance of such request is given within the original waiting period to the person to which it is directed, provided the written request is mailed to that person within the initial waiting period (requests to individuals must be sent by certified or registered mail). Notice of issuance of the Second Request may be given by telephone or in person to the individual named in Item 10(a) of the filing and the schedule must be read to the recipient, if requested.[25] See 16 C.F.R. § 803.20. Foreign companies are required to name in Item 10(b) an individual designated to receive service of a Second Request. The original waiting period expires at 11:59 p.m. Eastern Time on the thirtieth (the fifteenth in case of a cash tender offer or acquisition from a debtor in bankruptcy) calendar day following the beginning of the waiting period. See 16 C.F.R. § 803.10(b).

g. Other Provisions of the Act and the Rules

(i) Preliminary Injunction; Hearings

Section 7A(f) of the Clayton Act, 15 U.S.C. § 18a(f), provides that when the Division or the FTC files a motion for a preliminary injunction and certifies to the district court that the public interest requires relief pendente lite, the Chief Judge of such district shall immediately notify the Chief Judge of the Court of Appeals for that circuit who shall designate a district judge to whom the action is to be assigned for all purposes.

(ii) Enforcement of the Act

Section 7A(g)(1) and (g)(2) of the Clayton Act, 15 U.S.C. § 18a(g)(1)-(2), provide the enforcement mechanism for the Act. Under § 7A(g)(1), any person (or any officer, director or partner thereof) who fails to comply with any provision of the Act may be liable for a civil penalty of up to

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target has not complied. See 15 U.S.C. § 18a(e)(2). The target must still respond to the Second Request within a reasonable time (see § 803.21 of the Rules) or be subject to enforcement proceedings under Section 7A(g), 15 U.S.C. § 18a(g). The staff may want to consider issuing a CID to the target to ensure that the necessary information is obtained in a timely fashion. Similarly, staff may want to consider issuing a CID to an acquired person in bankruptcy, as it is unclear whether a Second Request to such an acquired person extends the waiting period. The Bankruptcy Reform Act of 1994, see supra note 17, provides that the waiting period can be extended in the same manner as a cash tender offer.

[25] In practice, the Second Request letters and schedules are typically faxed upon request.

$11,000[26] for each day during which such person is in violation of the Act. A 1991 Memorandum of Agreement between the Department of Justice and the FTC, for the purpose of promoting efficient and effective handling of civil penalty actions, provides that when the FTC requests that the Department of Justice bring a HSR civil penalty action, FTC attorneys may be appointed as Special Attorneys, under the supervision and control of the Attorney General.

Under § 7A(g)(2), 15 U.S.C. § 18a(g)(2), either enforcement agency can seek injunctive relief if there has not been substantial compliance with the notification requirements of the Act and the Rules or with a Second Request. Under this section, the district court may order compliance and "shall extend the waiting period . . . until there has been substantial compliance." (The Act contains one exception: where a person whose stock is sought to be acquired by means of a tender offer (either cash or non-cash) has not substantially complied, the waiting period may not be extended.) Section 7A(g)(2)(C), 15 U.S.C. § 18a(g)(2)(C), also authorizes the court to "grant such other equitable relief as the court in its discretion determines necessary or appropriate."

(iii) Confidentiality of HSR Materials

Section 7A(h) of the Clayton Act, 15 U.S.C. § 18a(h), provides that HSR material ("[a]ny information or documentary material" filed with the Division or the FTC pursuant to the HSR Act) may not be made public except "as may be relevant to any administrative or judicial action or proceeding." The FTC and the Division interpret this provision to mean an administrative or judicial action or proceeding to which the FTC or the Department of Justice is a party. Thus, HSR material may be disclosed in a complaint, brief, motion, or other pleading filed in an action to which the Department is a party. HSR material may also be disclosed, pursuant to the statute, to Congress.

HSR material is expressly exempted from disclosure under the Freedom of Information Act. It may not be disclosed to state or foreign enforcement agencies or to third parties during depositions or interviews without the consent of the party producing the material. The Division has taken the position that it will not disclose HSR material to other federal agencies. The confidentiality constraints apply not only to HSR information contained in HSR filings and Second Request responses, but also to the facts that an HSR filing has been made, a Second Request has been issued, and the date the waiting period expires.

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[26] The $11,000 daily maximum is to be adjusted periodically for inflation. (Indeed, the figure was previously $10,000 but has already been adjusted once for inflation.) The Debt Collection Improvement Act of 1996, Pub. L. No. 104-134, § 31001, 110 Stat. 1321, which amended the Federal Civil Monetary Penalties Inflation Adjustment Act of 1990, requires that civil penalties be adjusted for inflation at least once every four years.

Section 7A(h) has been interpreted by the two circuits that have addressed the issue as prohibiting the agencies from disclosing HSR information to state Attorney General offices. See Lieberman v. FTC, 771 F.2d 32 (2d Cir. 1985); Mattox v. FTC, 752 F.2d 116 (5th Cir. 1985). Mechanisms have been developed by the National Association of Attorneys General ("NAAG") and by the Division and FTC, that encourage parties in some instances to provide state enforcement officials with HSR materials and allow greater coordination between federal and state authorities investigating the same merger. NAAG's Voluntary Premerger Disclosure Compact allows parties voluntarily to file with a designated liaison state a copy of their initial HSR filings, and copies of Second Request schedules and production, in return for the Compact signatories agreeing not to serve their own compulsory process during the HSR waiting period.

To facilitate coordination of parallel federal and state merger investigations as much as possible within statutory constraints, the Department announced and implemented the March 1992 Protocol. By its terms, the Protocol applies where all acquiring and acquired persons in a transaction submit a letter to the Division that (1) agrees to provide the lead state (as designated by the NAAG Compact) all information submitted to the Division under the HSR Act or pursuant to CIDs, and (2) waives the HSR and CID confidentiality provisions to the extent necessary to allow discussions of protected materials between the Division and the state Attorneys General. Where these requirements are met, the Division will provide the lead state copies of our Second Request and CID schedules and the HSR waiting period expiration date. The Protocol further states: "To the extent practicable and desirable in the circumstances of a particular case, the Antitrust Division will cooperate with the lead state in analyzing the merger." The press release accompanying the announcement of the Protocol states that any such cooperation will be limited to avoid waiver of deliberative process, work product or other privileges. See Chapter VII, Section C.5 (describing in more detail the relationship between the Division and state Attorneys General in merger investigations).

The staff may frequently receive requests for greater protection for HSR material than that provided by the statute. As a policy matter, the Division will not grant greater restrictions on our use of HSR material than that contained in the statute. An exception to this policy can only be made after consultation with the Section Chief, FOIA, and the Director of Merger Enforcement.

The Division's policy is to try to give a submitter 10 days notice, whenever possible, before placing HSR material on the public record in any administrative or judicial action or proceeding, regardless of whether the submitter is a party. Exceptions to this policy may be authorized by the Assistant Attorney General, especially in cases where 10 days' notice is not feasible, for example, where a temporary restraining order is being sought or where documents are attached to initial motion papers. Use of HSR material during litigation should be governed by a court ordered protective

order.[27]

In contrast to the Antitrust Civil Process Act, which expressly permits CID material to be used by the Division in connection with the taking of oral testimony pursuant to CID, see 15 U.S.C. § 1313(c)(2), Section 7A does not expressly authorize the use of HSR material in CID depositions. Thus, use of HSR material at depositions is governed by Section 7A's requirement that no such information or documentary material "may be made public." Accordingly, HSR material produced by a party should not be shown to another party or third-party during a CID deposition or otherwise.

(iv) Relationship of Premerger Notification to Other Statutes

Section 7A(i), 15 U.S.C. § 18a(i), contains two important explanations of the relationship between the Act and other activities of the Division and the FTC. Under § 7A(i)(1), any action by either agency or any failure of either agency to take any action under the premerger notification legislation has no effect on any proceeding under any other provision of the HSR Act of any other provision of law. This means, for example, that the Division may challenge a transaction even if the waiting period has expired or if the Division has early terminated the waiting period. Moreover, under § 7A(i)(2), the ability of the enforcement agencies to make full use of the Antitrust Civil Process Act, the Federal Trade Commission Act, and any other provision of law "to secure at any time from any person documentary material, oral testimony, or other information" is not affected by the premerger notification requirements.

2. Reviewing Premerger Filings

a. Procedures For Getting Premerger Filings to the Staff for Review

The HSR Act requires parties to notify the Federal Trade Commission and the Department of Justice of certain proposed transactions. Three copies of the premerger notification form (and one set of attachments) must be submitted to the Division's Premerger Notification Unit/FTC Liaison Office and an additional two copies (and one set of attachments) must be submitted to the FTC. The filings are date stamped and immediately logged in. The FTC's Premerger Office assigns a premerger number to the transaction and computes the original waiting period. This information is immediately available to the Division through a direct link to the FTC's computer database. The Division's Premerger Notification Unit/FTC Liaison Office assigns the filing to the appropriate section based on the commodities involved in the transaction and the location of the parties. One copy of the filings with attachments is sent to the appropriate section for review and a copy of the filings without the attachments is sent to the Economic Analysis Group. The Premerger Notification Unit/FTC Liaison

[27] See 45 Fed. Reg. 21,215-16 (1980).

Office attaches to the filing a cover sheet that identifies the parties and when each filed, the premerger number, the date by which the section, task force, or field office needs to complete its initial review (the "section Chief's response due" date) and when the waiting period expires.

b. Substantive Review of the Filing

Generally, staff should, within five business days of receipt of a HSR filing (three days for a cash tender offer or bankruptcy filing), decide whether the filing raises competitive issues that need to be investigated. The primary basis for this determination is the HSR form and its attachments, although a large number of other sources of information are also available

(i) Contents of the Form

The Notification and Report Form appears as an appendix to Part 803 of the Rules. It is designed to provide the enforcement agencies with the information needed for an initial evaluation of any competitive impact of a proposed acquisition. The following information is requested by the form:

General background about the parties and the transaction is found in Items 1-3. Item 1 identifies what type of transaction is being reported and in what capacity the reporting person is reporting (e.g., as an acquiring person, as an acquired person, etc.). Items 2 and 3 identify all other parties to the transaction and require a description of the assets and/or securities to be acquired. Also required are disclosure of the proposed consummation date and submission of certain documents constituting the agreement.

The form requires parties to report sales by each appropriate Standard Industrial Classification ("SIC") number. Item 5 requires submission of revenue data on a 4, 5, and 7-digit SIC basis. Four-digit data are sought for a base year (currently 1992). More detailed 7-digit product data for the base year are also submitted. These 7-digit data must be updated to reflect added or deleted products. Five-digit data for manufacturing industries are sought for the most recent year. In non-manufacturing industries, only 4-digit data from the most recent year are provided.

Staff should identify all 4, 5 and 7 digit overlaps and determine market shares using census data, which are available from the Antitrust Library. Census data show the number of companies and total sales for most SIC codes. When reviewing SIC information, staff should be aware that the classifications are not intended to track antitrust product markets. SICs can be used as an initial proxy for markets, but are often either too broad or too narrow. In reviewing SIC data, staff should keep in mind that while a domestic manufacturer will report sales under a manufacturing SIC (with codes that start with 2, 3 or 4), firms that make products abroad and sell them in the United States through sales offices or agents typically report their sales under a wholesaling SIC code. The result is that two firms can be each others' primary competitors even though the HSR form shows no SIC overlap. In

addition, SIC categories are not always clear and some businesses may legitimately be placed in more than one category.

The limitations of SIC categories require staff always to review Item 4 documents that accompany the HSR form, even when the form does not reveal any SIC code overlap. Item 4 requires the reporting person to furnish copies of a variety of documents. Item 4(a) seeks a number of Securities and Exchange Commission documents including proxy statements, 10-Ks, 10-Qs, 8-Ks, and registration statements. Item 4(b) requires submission of annual reports, annual audit statements, and balance sheets. Item 4(c) asks for studies, surveys, analyses, and reports prepared by or for officers or directors for the purpose of evaluating or analyzing the acquisition with respect to various aspects of competition. Documents produced in response to Item 4(c) may include, for example, board of director presentations and offering memoranda created to find a purchaser for the acquired firm. These 4(c) documents contain the firms' own analyses of the affected markets and the benefits they perceive from the proposed acquisition. Parties are not required to translate Item 4 documents, but are required to submit English language outlines, summaries or translations that already exist. See 16 C.F.R. § 803.8(a).

Item 6 seeks information on significant (but less than controlling) shareholders and shareholdings of the reporting person.

Item 7 requires submission of geographic market data for transactions where 4-digit industry overlaps exist. This is important when reviewing industries characterized by local or regional markets.

Item 8 seeks information on significant vendor-vendee relationships between the parties to an acquisition. This question is intended to reveal vertical implications of the proposed transaction.

Item 9 seeks merger history data where 4-digit SIC code overlaps exist.

In response to items 5, 7, 8, and 9, information need be supplied only with respect to operations conducted in the United States. See 16 C.F.R. § 803.2(c).

(ii) Other Sources of Information

If a review of the HSR form and attachments raises competitive issues, staff should conduct a search of publicly available information to decide whether an investigation should be opened. These sources include, among others, on-line searches of articles about the relevant industries and companies and press accounts of the proposed transaction, an examination of Internet sources, such as company home-pages, and standard reference books kept in the Antitrust Division Library.

c. Assessing the Completeness of the Filing

In addition to substantively reviewing every HSR filing, staff should ensure that HSR filings are complete. When an HSR filing is incomplete or inaccurate, the FTC has the responsibility of notifying the parties. The FTC will require that the parties submit a corrected filing and file a new certification that the filing is complete. In those cases where the deficiency is significant, the waiting period will begin when the corrected filing is resubmitted. The FTC must inform parties of filing deficiencies promptly after the deficiency is discovered, but a filing can be rejected (or "bounced") whenever a deficiency is discovered, even if Second Requests have been issued and responses to the Second Request have been produced by the parties. The attorney reviewing the filing should promptly contact the FTC Premerger Notification Office and the Division's Legal Policy Section about any questions regarding the accuracy or completeness of a filing. If, for example, Second Request or voluntarily produced documents include documents that should have been submitted with the initial filing pursuant to Item 4(c), the Legal Policy Section and the FTC Premerger Notification Office should be promptly informed.

d. Recommendation to Open or Not Open an Investigation

Once an HSR filing has been assessed for completeness and substantively reviewed, staff should determine whether the proposed transaction poses no likely competitive harm or whether it raises questions sufficiently serious to warrant a preliminary inquiry. All decisions to recommend the opening of a preliminary inquiry and all close decisions not to do so should be discussed with the appropriate section Chief or Assistant Chief before the recommendation is made.

(i) The No-Interest Memorandum

When staff decides that a transaction does not warrant investigation, staff must fill out a "No-Interest" form. The form is found as a interactive macro in Word Perfect. The form records information such as the identity of the parties, the HSR transaction number, SIC codes, product and geographic overlaps and a summary of the transaction. In the "Comments" section, staff should explain why it recommends that no investigation be initiated. The form should be sent electronically to the reviewing official, usually the Chief or Assistant Chief. If the reviewer concurs in the recommendation, he/she will sign off on the recommendation using an "Approval" macro and will electronically inform the Division's Premerger Notification Unit/FTC Liaison Office.

(ii) Opening a Preliminary Inquiry

A staff decision to seek preliminary inquiry authority should be discussed with the Chief of the appropriate legal section before being drafted. When a section decides to seek a preliminary inquiry, staff should draft a PI Request Memo using the "Request For PI Authority" macro. See supra, Section B.2. Both the staff and the Chief of the legal section should ordinarily consult with the economist assigned to the matter before seeking PI authority. After the section Chief reviews the memorandum

and approves it, the section will send it to the Premerger Notification Unit/FTC Liaison Office by e-mailing it to the "PI Request" mailbox and the Special Assistant responsible for the component. The recommendation will be reviewed and clearance will be sought from the FTC to open the investigation.

e. Clearance Procedure

Since the Federal Trade Commission and the Department of Justice share enforcement responsibility for mergers and acquisitions, the two agencies have developed a clearance process to allocate responsibility between themselves for reviewing each proposed transaction. Only the agency with clearance may issue a Second Request. To trigger the clearance process at the Division, the section reviewing the transaction must submit to the Premerger Notification Unit/FTC Liaison Office a request to conduct a preliminary inquiry (the "PI Request Memo"). The PI Request Memo form is available as a computer macro: it requires background information about the parties, the commodity involved, the nature of the possible violation, and a brief description of why preliminary inquiry authority is necessary.

The Department and the Commission have agreed to a clearance process in mergers based primarily on past experience and expertise. To ensure speedy clearance, the Department and the Commission have established a deadline of nine business days from the date of notification to decide which agency will have responsibility for investigating a transaction. A cash tender offer or a bankruptcy clearance request will be resolved in seven days.

The process begins with the transmittal of a clearance request, which is an electronic form that lists the clearance number, the parties and the conduct being investigated, the geographic area, the premerger number and the end of the waiting period. If clearance is contested, written claims justifying each agency's right to investigate the matter will be exchanged, usually within one day after the matter becomes contested. The claims form should list each previous investigation or case claimed as expertise with a priority given to those matters handled within the past 5 years, identify how the matter relates to the transaction at issue, list any party expertise and indicate whether the investigation was "substantial" (in this context, substantial means the use of compulsory discovery). In compiling a claim, staff should request the Division's Premerger Notification Unit/FTC Liaison Office to conduct a search for all Division matters involving the contested parties and SIC codes. Clearance is granted to the agency with the stronger claim. (For more details on the clearance process, see Chapter VII, Section A.1.)

f. Preclearance Contracts with the Parties

Parties often request the opportunity to meet with the Division or to provide written information or analysis before clearance is resolved in order to assist the clearance process or to make better use of the initial review period. The Division and the FTC have agreed to a preclearance contacts policy

which provides that if the parties do not initiate contact with the staff, the Agencies will not initiate contact with the parties without first notifying the other agency and offering the other agency the opportunity to participate. If a party initiates contact, the contacted agency will advise the party that clearance has not been resolved and that any information should be provided simultaneously to both agencies. If a preclearance meeting is deemed appropriate, the contacted agency will coordinate with the other agency to offer the requesting party a joint meeting with both agencies. If a party initiating the contact asks the staff if it has any questions, the contacted agency should tell the party that clearance has not been resolved. The contacted agency may ask follow-up questions, but any written information provided in response to these questions should be submitted simultaneously to both agencies.

g. Maintaining the Filings

The Division takes the position that it may maintain HSR filings for future investigations. Each component has been directed to establish its own system of retaining HSR filings and periodically destroying filings that are no longer of interest to the section. Each document that is retained because it may be useful in future investigations should be kept with a cover sheet that identifies the party that submitted the documents and makes clear that they are protected from disclosure under the Act.

3. Merger Investigation Overview

a. The Preliminary Inquiry

The first phase of a merger investigation commences when FTC clearance has been granted and the staff has been granted PI authority. Staff should use this period to determine whether the proposed transaction raises issues substantial enough to warrant the issuance of a Second Request. To this end, when PI authority is obtained, staffs should outline their provisional theory of anticompetitive harm and should begin contacting customers, trade associations, competitors and other relevant parties to determine whether there are likely competitive concerns in any relevant markets. The Premerger Notification Rules do not foreclose the Division from employing other investigative resources, such as Civil Investigative Demands, during the course of the merger investigation.

Chapter VI describes the other resources available to the staff investigating a merger. It should be noted, however, that the economists from the Economic Analysis Group are important members of the investigative team. In addition, in cases where divestiture is considered a possible remedy or where efficiencies or "failing company" issues may be present, the Division's Corporate Finance Unit of the Economic Litigation Section should be advised at the earliest possible time.

The attorney(s) assigned to the matter should also contact the parties to discuss possible competitive concerns. The HSR Rules specifically provide for the enforcement agencies to request amplification or clarification of the information in the initial filing. Such requests are informal and

voluntary, and they do not extend the waiting period or affect the Division's right to make a Second Request. In fact, staff is encouraged to make such requests, since a clarification or amplification could help in determining that the Division has no interest in the transaction. After clearance has been received, the attorney should request that the parties voluntarily provide information such as customer lists, most recent bids, and most recent strategic and marketing plans. This information is extremely useful in deciding whether to issue a Second Request. The Division deems such voluntarily provided information as coming within the confidentiality protections of section 7A(h) of the Clayton Act, 15 U.S.C. § 18a(h). See supra Section D.1.g(iii). Care should be taken, however, to inform the parties that the voluntary request is not a formal Second Request.

b. Second Request Authority

If the staff concludes that a transaction might raise competitive problems and more information is needed to evaluate it, the staff should draft a Second Request, and obtain approval to issue it before the expiration of the applicable waiting period. The authority to make a Second Request has been delegated by the Assistant Attorney General to the Director of Merger Enforcement. A recommendation to make a Second Request should be e-mailed to the appropriate Special Assistant two full business days before the initial waiting period is due to expire. The recommendation should include a brief memorandum recommending a Second Request,[28] Second Request letters to the parties and the schedules setting forth the documents and information being sought. Since a Second Request may have substantial consequences for the parties to the transaction, staff should carefully assess the need for and scope of the request.

(i) Model Second Request

The Division and the FTC have agreed to a model Second Request schedule that increases consistency between the Agencies and reduces compliance burdens on the parties. The model Second Request is widely available and may be found in the Division Work Product Document Bank. Staff, in

[28] The Second Request recommendation memorandum should contain sections addressing each of the following topics: background on transaction and investigation; investigative theory (including subsections of the theor(ies) of competitive harm; possible product market(s); possible geographic market(s); best estimate of market shares and concentration; probable ease or difficulty of entry and any entry barriers; possible efficiencies; weaknesses in a potential case and ways they can be overcome; discussion of other theories investigated and discarded); EAG projects underway or planned (along with any special concerns of EAG); defense arguments and our initial response; outcome of past investigations in the industry; the ultimate likelihood or attractiveness of a case; and the basis for any proposed deviations from the model Second Request. Exemplars may be obtained from the appropriate Special Assistant.

consultation with EAG, may modify the model Second Request to delete requests that are unnecessary or to obtain additional documents or information necessary to review and possibly challenge the transaction.

(ii) The Second Request Letter

The Second Request letter is typically addressed to the entity that filed the HSR filing[29] and should read as follows:

> Pursuant to Section 7A(e)(1) of the Clayton Act, 15 U.S.C. § 18a, and Section 803.20 of the Premerger Notification Rules and Regulations, 16 C.F.R. § 803.20, the Antitrust Division requests additional information and documents relevant to the proposed acquisition [merger] of _____ by [with] _____. As provided by 15 U.S.C. § 18a(e)(2), and 16 C.F.R. § 803.20, this second request for information extends the waiting period, during which this proposed transaction may not be consummated, for 20 days [ten days] from the date of receipt by the Antitrust Division of all materials requested herein.[30] The requests for additional information and documents are contained in the enclosed Schedule.
>
> To comply with this request, deliver the materials by hand or by registered or certified mail to the _____ Section, Antitrust Division, Department of Justice, [address], Washington, D.C. 20530. You are also required to submit a certification attesting to the completeness of your response in accordance with Section 803.6 of the Premerger Notification Rules. Deliver the certificate to the above address and a copy to the Department of Justice, Antitrust Division, Premerger Notification Unit, Patrick Henry Building, 601 D St. NW, Room 10-013, Washington, D.C. 20530.
>
> If you have any questions regarding this request, please contact [name of lead attorney] at [telephone number].
>
> Sincerely,
>
> Director of Merger Enforcement
> Antitrust Division

(iii) Negotiating Modifications

Parties receiving Second Requests are encouraged to contact the staff to negotiate limitations or modifications to the Second Request. In considering requests for modifications, the staff should

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[29] See 16 C.F.R. § 803.20(a)(1).

[30] The language extending the waiting period should not be included in a Second Request letter to a tender offer target. See supra Section D.1.f.

consider the competitive issues involved, the manner in which information and documents are maintained by the parties, the type of information available to the parties, and the relative burdens to the parties of producing the requested information.

The Division has adopted an internal appeals process for requested modifications to a Second Request. This process provides for the party seeking modifications to appeal the Chief's decision to the appropriate Deputy Assistant Attorney General. The appeal should be in writing and no more than 10 pages long. It should include a concise explanation of the reasons why further compliance would be unduly burdensome and a summary of compliance discussions with the staff and Chief. The Reviewer may request additional information within two business days of receipt of the appeal and will render a decision on the appeal within seven business days after receipt of all necessary information.

(iv) Compliance with the Second Request

The staff attorneys conducting the investigation are responsible for ensuring that the parties have complied with the Second Request. Clear instructions should be given as to where the response should be sent. Second Request responses delivered after 5 p.m. Eastern Time on a regular business day, or at any time on any day other that a regular business day, shall be deemed received on the next regular business day. Delivery is effected on the last day when all the requested material is received and the parties have certified compliance with the Second Request. Section 803.3 of the Rules requires that a complete response be supplied to any request for additional information. See 16 C.F.R. § 803.3. If a party is unable to supply a complete response, it should provide a statement of the reasons for noncompliance.

The staff should determine whether the parties are in substantial compliance with the Second Request as soon as possible (generally well before the expiration of the second statutory waiting period, even if there is a timing agreement extending the waiting period or otherwise committing the parties to delay the closing). If the parties are in substantial compliance, the staff should inform the parties and confirm the date that the waiting period will expire. If the submission is not in substantial compliance, a deficiency letter should be prepared. This letter should specify the areas in which the submission is deficient and that the parties failed to provide an explanation for non-compliance. The deficiency letter may be issued over the signature of the Chief, but the parties may appeal the Chief's decision to the appropriate Deputy Assistant Attorney General. As with disputes over modifications, the appeal should be in writing and no longer than ten pages. It should include a concise explanation of the reasons why the party believes it is in compliance and a summary of the discussions with the staff and Chief. The Reviewer may request additional information within two business days and must render a decision on the appeal within three business days after receipt of all necessary information.

c. After the Second Request Is Issued

In the period between the issuance of the Second Request and substantial compliance by the parties, staff should conduct a thorough investigation that will allow them to decide whether a transaction is anticompetitive and should be challenged in court. If at any time the staff believes that a transaction is not likely to adversely affect competition, it may recommend that the investigation be closed. In certain investigations, when staff believes that the resolution of discrete issues through the examination of limited additional information could be sufficient to satisfy the Division that the transaction is not anticompetitive, the staff may arrange a "quick look" investigation. In a "quick look" investigation the parties refrain from complying fully with the Second Request and instead provide limited documents and information and the staff commits to tell the parties, by a particular date, whether full compliance will be necessary. In other investigations, it will be clear from the onset that the transaction raises serious issues that can only likely be resolved after a full investigation and compliance with the Second Request.

A full Second Request investigation typically will include: issuing CIDs to third parties to obtain information necessary to compute market shares and documents necessary to assess the relevant markets and competitive significance of the transaction; taking depositions and obtaining statements for use in court; retaining and working with experts; conducting legal research; complete preparation for reviewing Second Request documents and use of litigation support systems; and ensuring the preparation of economic and other evidence on the competitive effects of the transaction.

Because much has to be accomplished in a limited time period, the legal and economic staff should carefully develop a comprehensive plan for conducting the investigation. The plan should include who is responsible for implementing each part of the plan and when the task is to be accomplished. The focus should be on bringing the most persuasive evidence to bear on the issues of the investigation and include the appropriate use of discovery tools. One or more meetings are generally held with the Director of Merger Enforcement and appropriate Deputy Assistant Attorney General to discuss the case plan, case theory, and progress of the investigation.

Because parties may want more time than the waiting periods in the Act allow to discuss fully the competitive significance of transactions with the section, the Director of Merger Enforcement, the appropriate Deputy Assistant Attorney General, and the Assistant Attorney General, in appropriate cases the staff may, in consultation with the Chief and the Director of Merger Enforcement, negotiate timing agreements to allow for the orderly review of information and dialogue on the competitive significance of a transaction. In these agreements, the parties typically promise not to close the transaction for some period of the time after the expiration of the waiting period. The form of these agreements appropriately varies from transaction to transaction. The agreement should not commit the Director of Merger Enforcement, the appropriate Deputy Assistant Attorney General, or the Assistant Attorney General to meet with the parties or to decide on a challenge by any particular date without consultation with the Director of Merger Enforcement.

d. After the Parties Are in Substantial Compliance

Once the parties are in substantial compliance, see supra Section D.3.b(iv), the waiting period ends after 20 days, or 10 days in the case of a cash tender offer or bankruptcy filing. Unless the parties have committed not to close the transaction as part of a timing agreement, the Division must make a decision on whether to challenge the transaction and seek preliminary relief to prevent the transaction from closing.

After the parties have responded to a Second Request and certified that they are in substantial compliance, staff needs to carefully review the submission substantively, assess the completeness of the submission and whether a deficiency letter should be issued, finish any depositions that remain to be taken, and forward a recommendation and, if applicable, a revised order of proof as well as any proposed pleadings, to the Director of Merger Enforcement. A recommendation to close the investigation should include a request to early terminate the waiting period. See supra Section D.1.e.

3. Procedures for Recommending Suit

While the Second Request materials are being reviewed and all CID or voluntary request materials are being compiled, staff should assess the possibility of challenging the acquisition. If it appears likely that the staff will recommend challenging the acquisition prior to consummation, it should prepare the order of proof, evidentiary attachments and proposed pleadings at the earliest point practicable. Staff should prepare affidavits and exhibits as it completes its investigation. When the staff plans to accompany its motion papers, if suit is brought, with a declaration from an economist, the testifying economist assigned to the case should begin to prepare an declaration and accompanying exhibits. The legal basis for challenges to acquisitions prior to consummation is set forth in detail in Chapter IV, Section B, and that analysis should assist the staff in preparing the necessary papers. The Work Product Document Bank may be consulted for sources of specific pleadings filed in other matters.

Because of the time constraints placed on the staff by the HSR Act and Premerger Notification Rules, the Director of Merger Enforcement should be informed as soon as the staff believes a recommendation to file suit is likely. Staff should also coordinate with the Appellate Section, as their assistance may be useful in the event that it becomes necessary to seek a temporary restraining order or preliminary injunction. For more information on recommending a merger case, see infra Section G.2.b.

In the event that staff believes a challenge is not warranted, staff should prepare a closing memo detailing the reasons. The concurrence of the Chief and EAG should be indicated and the memo should be e-mailed to the Special Assistant responsible for the component. For more details on closing memos, see supra Section C.7. If the staff recommends closing prior to the parties substantially complying with the Second Requests, the waiting period will need to be terminated as discussed above.

See supra Section D.1.e.

E. Issuing Civil Investigative Demands

1. Function of Civil Investigative Demands

a. Where CIDs Can Be Used

In most of the civil matters handled in the Antitrust Division, both merger and non-merger, Civil Investigative Demands ("CIDs") can be used to compel production of information and documents if voluntary requests[31] are judged to be inadequate or inappropriate for the Division's needs. Under the Antitrust Civil Process Act ("ACPA"),[32] CIDs may be served on any natural or juridical person, including suspected violators, potentially injured persons, witnesses, and record custodians, if there is "reason to believe" that the person may have documentary material or information "relevant to a civil antitrust investigation."[33] The ACPA defines "antitrust investigations" to include "any inquiry" by an "antitrust investigator"[34] to ascertain if "any person is or has been engaged in any antitrust violation or in activities in preparation for a merger, acquisition, joint venture, or similar transaction, which, if consummated, may result in an antitrust violation."[35]

CIDs are the compulsory process tool of choice in civil antitrust investigations of potential

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[31] See supra Section C.3.

[32] 15 U.S.C. § 1311-1314. The text of ACPA is set out supra at Chapter II, Section A.6.

[33] 15 U.S.C. § 1312(a). If there is "reason to believe" that any violation within the Division's scope of authority has occurred, there is sufficient authority to issue a CID even in the absence of "probable cause" to believe that any particular violation has occurred. See, e.g., Australia/Eastern U.S.A. Shipping Conference v. United States, 1982-1 Trade Cas. (CCH) ¶ 64,721, at 74,064 (D.D.C. 1981), modified, 537 F. Supp. 807 (D.D.C. 1982), vacated as moot, Nos. 82-1516, 82-1683 (D.C. Cir. Aug. 27, 1986).

[34] An antitrust investigator is "any attorney or investigator employed by the Department of Justice who is charged with the duty of enforcing or carrying into effect any antitrust law." 15 U.S.C. § 1311(e). Division paralegals can serve as antitrust investigators.

[35] 15 U.S.C. § 1311(c). "Antitrust violation" is defined as "any act or omission in violation of any antitrust law, any antitrust order or, with respect to the International Antitrust Enforcement Assistance Act of 1994, any of the foreign antitrust laws." 15 U.S.C. § 1311(d).

Sherman Act[36] or Wilson Tariff Act[37] violations, and in civil investigations under the International Antitrust Enforcement Assistance Act of 1994.[38] CIDs are also available for use in Clayton Act[39] violation investigations, although where the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR")[40] authorizes the use of Second Requests,[41] the latter are usually the preferred form of compulsory process for obtaining information from the parties.

CIDs can only be served before the Division institutes a civil or criminal action.[42] CIDs may be issued, however, after the Division has decided to file a civil case, but before it has done so; compliance cannot be enforced after a complaint is filed. CIDs can also be used to investigate compliance with final judgments and orders in antitrust cases,[43] although in specific situations it may be more efficient to gather compliance evidence by relying upon the "visitation" provisions incorporated in most of the Division's civil judgments. A decision to issue CIDs generally involves a significant expansion in resources commitment by the Division and should be made only after serious consideration and a thoughtful reassessment of the matter's potential significance.

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[36] 15 U.S.C. §§ 1-7.

[37] 15 U.S.C. §§ 8-11.

[38] 15 U.S.C. §§ 6201-6212.

[39] 15 U.S.C. §§ 12-27.

[40] 15 U.S.C. § 18a.

[41] Division requests pursuant to 15 U.S.C. § 18a(e)(1) for additional information and documentary material from persons filing HSR premerger notifications are commonly called "Second Requests." Second Requests, rather than CIDs, are usually served on parties filing HSR premerger notifications because, under 15 U.S.C. § 18a(e)(1), service of a Second Request extends the statutory waiting period before the transaction can lawfully be consummated. Service of CIDs does not extend this period. Nevertheless, CIDs are usually the only form of compulsory process available in such investigations to compel production by third parties. Moreover, brief CIDs served on parties in such investigations early in the waiting period may serve to permit more precise and terse drafting of Second Requests in some instances. CIDs can also be served on parties to supplement the Second Request, although obtaining timely production of material so requested may prove problematical.

[42] See 15 U.S.C. § 1312(a).

[43] See 15 U.S.C. §§ 1311(b), 1311(d).

b. Criminal Investigations

In the event that a civil antitrust investigation uncovers evidence indicating that criminal prosecution is more appropriate than civil enforcement, a grand jury investigation should be opened; further investigation may not be conducted by CID but rather must proceed by the grand jury process. Thus, for instance, CIDs may not be used to investigate violations of Section 3 of the Robinson-Patman Act,[44] which imposes solely criminal penalties. Evidence already obtained by CIDs may, however, be presented to the grand jury.[45]

c. Other Matters Wherein CID Use Is Not Authorized

CIDs may not be issued to investigate conduct that is clearly exempt from the antitrust laws, but CIDs can be issued to determine whether specific conduct falls within an exempt category. [46] Nor can CIDs be issued to investigate violations of the Federal Trade Commission Act,[47] the Newspaper Preservation Act of 1970,[48] or in preparing responses to requests for Business Review Letters.[49] There is also no authority to issue CIDs in connection with the Division's participation in proceedings before federal regulatory agencies, but information previously gathered by CIDs validly issued for other

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[44] See 15 U.S.C. § 13(a). As noted in Chapter VII, Section A, Robinson-Patman matters are traditionally referred to the FTC.

[45] See 15 U.S.C. § 1313(d)(1).

[46] See infra Section E.8.d.

[47] See 15 U.S.C. § 1311(a).

[48] 15 U.S.C. § 1803(b). However, if the Attorney General orders a public hearing in such a case, the administrative law judge appointed to preside over it is authorized to permit any party (including the Antitrust Division) to conduct discovery "as provided by the Federal Rules of Civil Procedure." 28 C.F.R. § 48.10(a)(3).

[49] See 28 C.F.R. § 50.6. However, the Division is empowered to condition its consideration of such requests upon the requestor's cooperation by voluntarily furnishing any information or documents demanded by the Division. See id. Moreover, if grounds to open a civil antitrust investigation are discovered in the course of preparing a Business Review Letter, CIDs can obviously be issued in that investigation.

purposes may be used in such proceedings.[50] Given the statutory definition of "antitrust investigation,"[51] CIDs may not be used to investigate possible terminations of judgments or violations of stipulations during the Tunney Act public comment period prior to entry of a consent decree, nor may CIDs be used to investigate proposed, but not yet implemented, actions that could constitute civil, non-merger, antitrust violations unless there is some reason to believe the proposal itself has anticompetitive effects.

d. Basic Characteristics of CIDs

CIDs can require a recipient to produce specified documentary materials and products of discovery,[52] give sworn answers to written interrogatories, give a sworn oral deposition, or to furnish any combination of such responses. There are separate forms for each.

CIDs should be prepared after the theory of the violation being investigated has been carefully formulated, and should request the information and documentary material needed to develop and establish the violation in accordance with that theory. Additional breadth of scope is generally to be avoided as unnecessary, inasmuch as additional CIDs can subsequently be served on the same person or others if the need for additional material later develops.[53] Unnecessarily broad CIDs can delay an investigation by consuming additional time for respondents' production and Division staff's review of material that is not likely to contribute to the investigation's outcome. Special care should be taken to keep CIDs served upon third parties as narrow as possible, consistent with the investigation's goals. In some situations, a sharply honed CID with minimal instructions and definitions and only a very limited number of requests can encourage a prompt response.

CIDs issued for purposes that satisfy the requirements of the ACPA must nevertheless conform to all other applicable legal requirements and regulations. Such additional provisions must be considered, for example, before serving a CID on an attorney for information relating to the

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[50] See 15 U.S.C. § 1313(d)(1).

[51] See 15 U.S.C. § 1311(c).

[52] See 15 U.S.C. § 1312(a). The term "products of discovery" includes depositions, documents, interrogatory answers and other items obtained by discovery in any judicial or administrative litigation "of an adversarial nature." 15 U.S.C. § 1311(i). The requirements for requesting production of products of discovery by CID are more fully discussed below. See infra Section E.3.a(iii).

[53] By contrast to HSR Second Requests, there is no limit, short of imposing undue burden, on the number of successive CIDs that can be served on a person in a given investigation.

representation of a client,[54] issuing a CID to a reporter or news media organization for information gathered in the course of reporting news,[55] or issuing a CID to obtain customer transaction records from a financial institution.[56] See infra Section F.6 (providing additional instances where such special considerations apply).

2. Legislative History of the Antitrust Civil Process Act and Amendments

a. 1962 Act

The ACPA had its origin in the final report of the 1955 Attorney General's National Committee to Study the Antitrust Laws, which noted that one of the problems faced by the Department of Justice in effectively enforcing the antitrust laws was the lack of compulsory process to obtain evidence during investigations where civil proceedings were contemplated from the outset.[57] As the Committee pointed out, inadequate investigative tools may lead to incomplete investigations that may in turn mean civil proceedings that a more careful search and study would have shown to be unjustified. The ultimate social cost may be "a futile trial exhausting the resources of the litigants and increasing court congestion."[58] To remedy this deficiency, the Committee recommended legislation to authorize the Department of Justice to issue civil investigative demands requiring the production of documents relevant to a civil antitrust investigation.

The need for such legislation was buttressed by the Supreme Court's opinion in United States

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[54] See United States Attorney's Manual, § 9-2.161(a).

[55] See 28 C.F.R. § 50.10; see also infra Section F.11.b (discussing analogous procedures which apply in the context of issuing grand jury subpoenas to news organizations). In 1980, Attorney General Civiletti ruled that the restrictions of this regulation do not apply to subpoenas directed to news organizations that seek purely commercial or financial information related to antitrust investigations, as opposed to information gathered by the organization's reporters. The Attorney General further directed the Antitrust Division that it was not to issue any form of compulsory process to a news media organization unless the AAG personally approves it after determining that the request related to purely commercial or financial information.

[56] See Right to Financial Privacy Act of 1978, 12 U.S.C. §§ 3401-3422; United States Attorney's Manual §§ 9-4.842 to .844.

[57] Report of Attorney General's National Committee to Study the Antitrust Laws 343-45 (1955).

[58] Id. at 344.

v. Procter & Gamble Co.,[59] which condemned the use of the grand jury for the purpose of eliciting evidence for a civil case. This opinion drew further attention to the fact that the Division was forced to rely in civil investigations on the voluntary cooperation of those under investigation. Congress responded by passing the ACPA in 1962.[60]

As originally enacted, the ACPA authorized the issuance of CIDs for service only upon corporations and other non-natural persons that were the targets of a civil investigation, and only to compel the production of documents. In 1965, this narrow reach of the original ACPA was confirmed by the Ninth Circuit's decision in United States v. Union Oil Co.[61] where the court concluded that a CID had to be "confined to material relevant to the ascertainment of whether or not a person 'is or has been engaged in any antitrust violation.'" Moreover, the court held that this did not include investigations of activity, such as proposed acquisitions or mergers, that might result in a future violation.

b. 1976 Amendments

The Hart-Scott-Rodino Antitrust Improvements Act of 1976[62] amended the ACPA to provide the Division with additional tools for the conduct of effective civil investigations. As so amended, the ACPA permits the Division to issue CIDs for oral testimony and interrogatory answers in addition to documents, and permits CIDs to be served on natural persons as well as on corporate or other legal entities. The amendment also allows CIDs to be used to investigate potential violations such as contemplated mergers and permits CIDs to be served on persons who are not suspected violators.

c. 1980 Amendments

Additional amendments to the ACPA were made by the Antitrust Procedural Improvements

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[59] 356 U.S. 677, 683 (1958).

[60] Soon after its enactment, CIDs issued under ACPA were challenged on constitutional grounds. However, all such challenges were rejected by the courts. Hyster Co. v. United States, 338 F.2d 183 (9th Cir. 1964); Petition of CBS, 235 F. Supp. 684 (S.D.N.Y. 1964); Petition of Gold Bond Stamp Co., 221 F. Supp. 391 (D. Minn. 1963), aff'd per curiam, 325 F.2d 1018 (8th Cir. 1964). A later challenge to a CID based in part on constitutional grounds was also rejected in First Multiple Listing Service v. Shenefield, 1980-81 Trade Cas. (CCH) ¶ 63,661 (N.D. Ga. 1980).

[61] 343 F.2d 29, 31 (9th Cir. 1965).

[62] Pub. L. No. 94-435, 90 Stat. 1383.

Act of 1980.[63] These amendments authorize the Division to obtain products of discovery by CID even though the material is subject to a protective order restricting its disclosure. See infra Sections E.3.a(iii), E.8.e. The 1980 amendments also expressly authorize the Division to disclose CID material to "agents" of the Division, such as independent contractors specializing in automated document retrieval (who may be retained for indexing) or to economic experts or industry specialists. See infra Section E.6.

d. 1994 Amendments

The International Antitrust Enforcement Assistance Act of 1994[64] further amends the Act. This statute authorizes the Attorney General and the Federal Trade Commission to enter into "antitrust mutual assistance agreements" with antitrust enforcement authorities of foreign countries or multinational entities to allow reciprocal disclosure of evidence concerning possible violations of the antitrust laws of such a country, and to "use their existing respective antitrust investigative authority" to obtain such evidence.[65] To that end, this statute broadens the ACPA's definition of "antitrust violation"[66] to include "with respect to the International Antitrust Enforcement Assistance Act of 1994, any of the foreign antitrust laws."[67]

3. Types of Civil Investigative Demands

Every CID must identify the conduct being investigated and the statute potentially being violated,[68] and must name a custodian and deputy custodian.[69] In addition, every CID should state the

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[63] Pub. L. No. 96-349, 94 Stat. 1154.

[64] 15 U.S.C. §§ 6201-6212, Pub. L. No. 103-438, 108 Stat. 4597.

[65] 15 U.S.C. § 6201. At this time no antitrust mutual assistance agreements are in force, although a proposed agreement with Australia has been published in the Federal Register for public comment. See 62 Fed. Reg. 20,022 (1997).

[66] 15 U.S.C. § 1311(d).

[67] 15 U.S.C. § 6202(b).

[68] See 15 U.S.C. § 1312(b)(1). Care should be taken in drafting this section. Some CID challenges have been based in part on allegations that the conduct described is not an antitrust violation, or that the requests are not tailored to the conduct. See infra Section E.8.

[69] See 15 U.S.C. § 1313(a). If the investigation is later transferred to other personnel, the AAG should sign a letter to the CID recipient notifying it of the transfer of its CID materials to a different

name and telephone number of a Division attorney who can answer inquiries about the CID, and should draw attention to the text of 18 U.S.C. § 1505 printed on the back of the CID form.

a. CIDs for Documentary Material

(i) Description

The ACPA requires that CIDs for documentary material must "describe the class or classes of documentary material to be produced thereunder with such definiteness and certainty as to permit the material to be fairly identified,"[70] a standard comparable to the one applied in civil discovery and to grand jury subpoenas duces tecum.[71]

(ii) Originals and Copies

The Act's definition of "documentary material" expressly includes the "original and any copy" of requested documents.[72] By specifying that "each nonidentical copy" of each requested document be produced, comments written on widely circulated documents can be obtained.

(iii) Products of Discovery

CIDs for documentary materials can be used to compel production of "any product of discovery . . . [that was] obtained by any method of discovery in any judicial litigation or in any administrative litigation of an adversarial nature"[73] that is in the possession, custody, or control of the CID respondent. Moreover, a CID for products of discovery "supersedes any inconsistent court order, rule, or provision of law . . . preventing or restraining disclosure of such product of discovery to any person."[74] Thus, the CID respondent may not resist production on the basis of protective orders

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custodian. See infra Section E.7.

[70] 15 U.S.C. § 1312(b)(2)(A).

[71] Judicial interpretation of this standard is discussed below. See infra Section E.8.

[72] 15 U.S.C. § 1311(g).

[73] 15 U.S.C. § 1311(i).

[74] 15 U.S.C. § 1312(c)(2). This section also provides that the disclosure to the Division of a product of discovery, pursuant to an express demand for products of discovery, does not constitute a waiver of any right or privilege, such as the work product privilege, to which the person making the

previously entered in the litigation wherein the products of discovery were obtained.

In order to enable the person from whom the products of discovery were obtained to protect any legitimate interest in preventing or conditioning their production in response to a CID, the ACPA requires that a copy of any CID for products of discovery must be served upon the person from whom the discovery originally was obtained,[75] and requires that the respondent wait at least twenty (20) days

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disclosure may be entitled.

[75] See 15 U.S.C. § 1312(a) (last sentence). Service of a copy of the CID demanding products of discovery on the person from whom discovery was obtained can be made by mail. A letter such as the following should be included in the mailing:

CERTIFIED MAIL DATE
RETURN RECEIPT REQUESTED

XYZ Corporation
Address

Attn: General Counsel
Re: Civil Investigative Demand No. XXXX Served Upon ABC Corp.
for Products of Discovery Obtained from XYZ Corporation

Ladies and Gentlemen:

Enclosed is a copy of Civil Investigative Demand XXXX ("CID") being served by mail simultaneously herewith upon ABC Corporation ("ABC"), a corporation of Delaware with its principal place of business at 123 Fourth Street, San Luis Obispo, CA 01234. As you can see, paragraph 1 of the Schedule accompanying the CID expressly demands that ABC produce to us certain products of discovery obtained from you in connection with prior civil litigation in which you were both involved.

Please be advised that, pursuant to 15 U.S.C. § 1312(c)(2), this CID supersedes any inconsistent order, rule, or provision of law (other than in title 15, Chapter 34, United States Code) preventing or restraining disclosure of these products of discovery to any person, including any protective order that may heretofore have been entered in the litigation in which ABC obtained these products of discovery.

Pursuant to 15 U.S.C. § 1314(c), you have the right to petition the district court of the United States for the judicial district in which the proceeding in which the discovery was obtained is or was last pending for an order modifying or setting aside the CID. Such a petition must be filed prior to ABC's compliance with the CID. Pursuant to 15 U.S.C. § 1312(b)(last sentence), ABC is not permitted to comply with this CID until 20 days after service of this notice upon you, but may comply at any time thereafter. The CID requests ABC's compliance not later than xxxxx.

If you have any questions regarding this matter, please feel free to call me at 202/xxx-xxxx.

Sincerely, John Smith, Trial Attorney

after such service before producing the products of discovery in response to the CID.[76] Both the person receiving the CID and the person from whom the discovery products were obtained have the right to object to the CID.[77] It is usually preferable to request production of products of discovery obtained from a particular source by separate CID. This step will avoid delay in the response to other requests included in the CID and minimize the dissemination of information concerning the requests being made of the CID recipient.

The "products of discovery" producible in response to a CID include deposition transcripts, interrogatories, documents, admissions, "things," "results of inspection of land or other property," and "any digest, analysis, selection, compilation, or any derivation thereof; and any index or manner of access thereto."[78]

(iv) Time Allowed for Production

The CID must specify a return date that "will provide a reasonable time within which the material so demanded may be assembled and made available for inspection and copying or reproduction."[79] The length of time to be allowed for response in a specific case obviously depends on such circumstances as the number of files and locations required to be searched in preparing the response, other proceedings involving the respondent (e.g., depositions) occurring simultaneously, and the needs of the Division. The return date stated in the CID must often be selected on the basis of incomplete knowledge by the Division as to the factors that determine its reasonableness. Consequently, CIDs are commonly served with a covering letter inviting the respondent or its counsel to telephone the staff promptly after receipt of the CID to discuss a reasonable response time.[80]

As previously mentioned, CIDs containing an "express demand for any product of discovery"

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[76] See 15 U.S.C. § 1312(b) (last sentence).

[77] See 15 U.S.C. §§ 1314(b)(1)(B), 1314(d).

[78] 15 U.S.C. § 1311(i). The ACPA defines the products of discovery obtainable by CID more broadly than it defines "documentary material." Compare 15 U.S.C. § 1311(g) with 15 U.S.C. § 1311(i). Thus, for instance, a CID recipient can be required to produce "things" obtained as products of discovery, a category of materials that a CID respondent could not be compelled to produce if the respondent had not obtained it by discovery.

[79] 15 U.S.C. § 1312(b)(2)(B).

[80] For a more complete discussion of negotiations with CID recipients after service of a CID, see infra Section E.3.a(vi).

cannot be made returnable fewer than 20 days before a copy of the CID has been served on the person from whom the discovery was obtained.[81]

(v) Manner of Production

The Act requires the respondent to make the requested documentary material "available for inspection and copying or reproduction" on the return date at its principal place of business, but authorizes alternative means of compliance by agreement with the Division.[82] In most instances, CIDs are served with a cover letter specifying that the respondent may comply by mailing or shipping copies of the requested documentary materials to a specified address at the Division by the return date, but reserving the Division's right subsequently to request production of the originals. Since such alternative means of production are usually more convenient both for the respondent and the Division, requests to reimburse respondents for copying costs are usually unjustified. Moreover, the Division is not authorized to reimburse respondents for the cost of searching for responsive documents, and no agreement for such reimbursement should ever be made.[83]

If document copies are produced that are illegible and the respondent refuses to produce the originals, the Attorney General is authorized to petition the appropriate District Court for an enforcing order.[84]

A CID response is not complete without proper execution of the certificate of compliance on the back of the CID form.[85]

(vi) Offer to Discuss Problems Raised by CID with Recipients

At the time CIDs are drafted, Division staff often lacks information about the manner in which respondent's documents are organized, their geographic distribution, accessibility, and other factors relevant to setting a reasonable response date. Consequently, the Division generally serves CIDs with a

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[81] 15 U.S.C. § 1312(b) (last sentence).

[82] 15 U.S.C. § 1313(b).

[83] A request by several CID recipients that the Division be required to share the cost of compliance was rejected by a district court, albeit without discussing whether the Division could be required to do so. See Finnell v. United States Dep't of Justice, 535 F. Supp. 410, 415 (D. Kan. 1982).

[84] See 15 U.S.C. § 1314(a).

[85] See 15 U.S.C. § 1312(g).

cover letter inviting respondent, or its counsel, to telephone an antitrust investigator identified in the letter in order to attempt to resolve any avoidable problems created by the CID.[86] Responders to this

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[86] The cover letter accompanying CID service may take the following form:

MJM:SH
60-1234-5678

DATE

BY CERTIFIED MAIL
RETURN RECEIPT REQUESTED

[Addressee]

Re: Civil Investigative Demand No. XXXX

Ladies and Gentlemen:

Attached to this letter is Civil Investigative Demand ("CID") No. XXXX, issued pursuant to the Antitrust Civil Process Act, 15 U.S.C. §§ 1311-14, requiring your company to produce certain documents and interrogatory responses as specified in the attached Schedule. This material is sought in connection with the Antitrust Division's investigation into possible agreements in restraint of trade and possible monopolization or attempted monopolization in the marketing, sale, and distribution of left-handed widgets.

As noted on the CID, the due date for compliance is _____. Please note that on the reverse side of the CID is a certificate of compliance that must be completed and submitted along with the documents called for in the Schedule.

As you will note, I am the Deputy Custodian of the documentary materials and interrogatory answers sought from you. To minimize your inconvenience in complying with the CID and to assist us, we propose that you submit all material by mail or messenger to me at the following address:

Sam Houston
X Section
U.S. Department of Justice
325 Seventh St., N. W.
Washington, D.C. 20530 (if via U.S. mail)
20004 (via Federal Express)

In complying with the CID, you may produce copies of documents in lieu of originals, and may send the documents directly to me at the address printed above. If you have any questions or wish to discuss modifications in the Schedule that would facilitate your compliance, please call me at 202/555-1212.

Sincerely yours,

Sam Houston
Attorney
X Section

invitation often propose modifications in the scope of the request in addition to seeking to enlarge the time for response.

The first step in compliance negotiations is often to encourage counsel for the respondent to provide an oral summary of the functions of relevant company personnel and the types and locations of company records. Where there is a question whether voluminous files would be helpful to the investigation, the staff attorney may specify that, initially, any 5-10 sample files be produced for inspection and evaluation.

Respondents' proposals to narrow the scope of the request must obviously be assessed in the context of the Division's needs for information and evidence necessary to satisfy the objectives of the investigation. Where it appears that specific deletions can be made from the information or documentary material requested by the CID without peril to those objectives, the CID recipient can be permitted to defer production of the deleted material. The credibility of respondent's representations in support of such proposals must be carefully scrutinized before they are accepted as grounds for narrowing the scope of a CID. Outright cancellation of portions of the CID, as opposed to deferral of the response thereto, should not be agreed to until the investigation has progressed to the point that the lack of need for the deferred material has been convincingly established.

Generally, responses will be made more quickly if the staff attorney can narrow the required search--as an initial matter--to the files of a few key personnel. Often narrowing the requests themselves will not save significant additional time, because once an individual's files have to be searched, the number or breadth of the requests may not significantly affect the amount of time it takes to conduct the search of those files. Again, search of other personnel's files should not be canceled, but only deferred, unless it is clear the additional materials will not be needed, even in litigation.

Before determining which files should be searched at the outset, the staff attorney should ensure that he or she fully understands what files the CID recipient maintains and where they are located as well as the range of responsibilities of all relevant personnel. General statements of counsel that "we have no such documents" in response to a CID request should be the beginning of the discussion, not its end. If necessary to reach important information, an additional CID can be issued.

Revisions to the response date are best discussed after agreement is reached on all proposed revisions to scope. An agreed-upon schedule for staggered production often benefits both the respondents and the Division. In working out such a schedule, production of documents and information likely to hold the key to the investigation's further progress should obviously be given a high priority.

Enclosure

b. CIDs for Written Interrogatories

CID interrogatories may request the statement of facts and contentions. The Act requires that they be "propound[ed] with definiteness and certainty."[87] Respondents are required to answer each interrogatory "separately and fully in writing under oath, unless it is objected to, in which event the reasons for the objection shall be stated in lieu of an answer."[88] As is the case with CIDs for documentary materials, phased responses are authorized, and the CID response is not complete without proper execution of the certificate of compliance on the back of the CID form.[89] Usually, interrogatories aimed at obtaining facts and data are more useful than contention interrogatories, but the latter are useful on occasion.

c. CIDs for Oral Testimony

(i) Notice

A CID for oral testimony must state the date, time, and place where the testimony will be taken, identify an antitrust investigator who will conduct the examination,[90] and identify a custodian for the transcript of the deposition. The ACPA neither expressly authorizes nor forbids deposing corporations and other entities by a procedure comparable to that authorized under Rule 30(b)(6), Fed. R. Civ. P. In appropriate circumstances, a CID can be issued to such a non-natural person to produce, in order to

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[87] 15 U.S.C. § 1312(b)(3)(A).

[88] 15 U.S.C. § 1312(h).

[89] See id.

[90] See 15 U.S.C. § 1312(b)(4). Although the Act defines "antitrust investigator" broadly as to include non-lawyers, 15 U.S.C. § 1311(e), CID depositions should be conducted by lawyers in the absence of highly exceptional circumstances. Moreover, although the Act requires that only one antitrust investigator be designated on the face of the CID to conduct the examination, 15 U.S.C. § 1312(i)(2) indicates that more than one Division antitrust investigator may be present at a CID deposition. This point was also made by Senator Hart in the Senate debates on the Hart-Scott-Rodino Antitrust Improvements Act of 1976 when he stated that "the oral examination is to be conducted by the antitrust investigator (accompanied by any assistants he may need)." 123 Cong. Rec. S15,416 (daily ed. Sept. 8, 1976) (statement of Sen. Hart).

testify on its behalf, the individual most knowledgeable on specified subjects.[91]

(ii) Location and Procedure for Taking Testimony

The statute provides that testimony may be taken in the federal judicial district where the witness resides, is found, or transacts business, or in any other place agreed upon by the Division and the deponent.[92] The general practice is to conduct the deposition at an office of either the Division or the U.S. Attorney for the district in which the deposition is being taken.

The deposition must be taken before an officer authorized to administer oaths and affirmations, and the testimony must be taken stenographically and transcribed.[93] Usually, the stenographer who

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[91] The notice for such an oral CID deposition can be captioned as follows:

To:	The individual most familiar with widget sales records at XYZ Corporation for 1993-94; Address	Civil Investigative Demand No. XXXX

The CID can also be addressed to "the person or persons designated in the attached schedule. A schedule can then be attached with one or more descriptions (i.e., "the individual with primary responsibility for the ABC account"). Alternatively, albeit with some delay, the Division may serve CID interrogatories requesting identification of the most knowledgeable person concerning specified subject matter, and then serve a CID for the oral deposition of that person. Also, although there is no standard form to compel a witness to appear for a CID deposition with specified documents, a result similar to that authorized by Rule 30(b)(5), Fed. R. Civ. P., can be achieved under the Act by serving, with or after the CID for oral deposition, a documentary CID specifying production of the documentary material at the time and place of the deposition. Obviously, when such a procedure is used, the deponent should only be required to bring a very limited number of documents to the deposition, and prompt copying may have to be arranged.

[92] See 15 U.S.C. § 1312(i)(3). A CID deponent is entitled to the same fees and mileage as is paid to witnesses in U.S. district courts. 15 U.S.C. § 1312(i)(8). Payment should be arranged through the U.S. Marshal's Office or the U.S. Attorney in the district where the deposition is being taken. Division attorneys should consult with the U.S. Attorney's Office to determine the local practice.

[93] See 15 U.S.C. § 1312(i)(1). The stenographer should be reminded at the outset of any CID deposition, and perhaps again thereafter, that the deposition transcript is to be marked as protected under the Antitrust Civil Process Act, 15 U.S.C. § 1312(i), and that no copies thereof are to be released to the witness or to anyone other than the Antitrust investigator or custodian named in the CID.

records the testimony serves as the officer administering the oath or affirmation.[94]

CID depositions are closed to the public. Only the person testifying, his or her counsel, the antitrust investigators conducting the deposition, the officer before whom the testimony is to be taken, and any stenographer taking the testimony may be present.[95] The ACPA explicitly provides that the Publicity In Taking Evidence Act[96] does not apply to CID depositions.

(iii) Right to Counsel, Objections, Privilege, Cross-Examination

A CID deponent may be accompanied, represented, and advised by counsel at the deposition.[97] Counsel may advise the witness, in confidence, either upon the request of the witness or upon the counsel's own initiative with respect to any question asked of the witness. The witness or counsel may object on the record to a question and briefly state the reason for the objection. The ACPA provides that an objection may properly be made, received, and entered upon the record when it is claimed that the witness is entitled to refuse to answer the question on grounds of any constitutional or other legal right or privilege, including the privilege against self-incrimination, which is discussed below. The statute provides that there is no other ground for refusing to answer a question or for interrupting the oral examination.[98] If the witness refuses to answer a question, the antitrust investigator conducting the examination may petition the district court for an order compelling the witness to answer.[99] See infra Section E.8 (discussing judicial enforcement). The CID statute does not provide for questioning by the witness's counsel at the close of the Division's questions, and such questioning is generally not permitted (although in some situations staff may choose to allow a few clarifying questions from counsel). CID depositions differ in this respect from depositions taken pursuant to Fed. R. Civ. P.

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[94] Cf. Division Directive ATR 2570.1, "Payment of Litigation-Related Expenses" (concerning arranging for the services of a stenographic reporter).

[95] See 15 U.S.C. § 1312(i)(2); see also Chapter VII, Section C.5.b(ii) (regarding the presence of state Attorneys General staff at CID depositions).

[96] 15 U.S.C. § 30.

[97] See 15 U.S.C. § 1312(i)(7)(A). If an issue arises concerning counsel's conflict of interest in representing both the witness and his/her employer or principal, it may be useful to have the witness's statement on the record as to who his lawyer is. If the witness does not so identify the lawyer at the deposition, that lawyer must be excluded from the deposition.

[98] See 15 U.S.C. § 1312(i)(7)(A).

[99] See 15 U.S.C. § 1314(a).

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(iv) Immunity

A CID deponent may refuse to respond to a question on the basis of the privilege against self-incrimination.[100] Since a CID deposition is a "proceeding before an agency of the United States" as contemplated in 18 U.S.C. § 6002(2), the Department of Justice may compel the testimony of the deponent under a grant of immunity in accordance with 18 U.S.C. § 6004. The latter section permits a governmental agency to issue an order compelling the testimony of an individual in an agency proceeding providing it has the approval of the Attorney General and determines that the prospective testimony is necessary to the public interest and will otherwise be withheld under a Fifth Amendment self-incrimination claim. The authority of the Department of Justice to issue a compulsion order in connection with a CID deposition has been specifically delegated to the AAG and the Deputy AAGs of the Antitrust Division.[101] See infra Section F.6 (discussing other procedures that must be followed, including OBD-111s and Criminal Division clearance).

(v) Witness's Review and Signature of Transcript

After the testimony is transcribed, the witness, must be afforded a reasonable opportunity to

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[100] The self-incrimination privilege is only available to natural persons, not corporations.

[101] See 28 C.F.R. § 0.175(c). The following form letter is to be served on the deponent to compel his/her testimony:

[Addressee] DATE

Re: Civil Investigative Demand No. ___

Dear _____:

Pursuant to the authority vested in me by 18 U.S.C. § 6004, you are hereby ordered to give testimony and provide such other information which you refuse to give or provide on the basis of your privilege against self-incrimination as to all matters about which you may be interrogated in connection with the above-captioned Civil Investigative Demand for Oral Testimony issued on _____, by the Antitrust Division of the United States Department of Justice.

You may not refuse to testify or provide other information on the basis of your privilege against self-incrimination. No testimony or other information compelled under this order (or any information directly or indirectly derived from such testimony or other information) may be used against you in a criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with this order.

Sincerely,

[Name]
Assistant Attorney General
Antitrust Division

examine the transcript, unless such examination is waived by the witness.[102] Any changes in form or substance that the witness desires to make are to be entered and identified upon the transcript by the officer/stenographer or antitrust investigator, together with a statement of the reasons given by the witness for making these changes. The transcript is then to be signed by the witness unless the witness waives signature in writing, is ill, cannot be found, or refuses to sign. If the transcript is not signed by the witness within 30 days of being afforded a reasonable opportunity to examine it, the officer/stenographer or antitrust investigator is authorized to sign it and state on the record the fact of the waiver, illness, absence of the witness, or the refusal to sign, together with the reason, if any, given for the refusal. The transcript must contain a certificate of the officer to the effect that the witness was duly sworn by him and that the transcript is a true record of the testimony given by the witness.[103]

(vi) Witness's Right to a Copy of Transcript

A witness who has given a CID deposition has the right to receive a copy of the deposition transcript for a reasonable fee unless the AAG determines that the transcript should be withheld for good cause.[104] Generally, CID deponents are allowed to obtain a copy of their deposition transcripts from the Division as a matter of course.[105]

Congress, however, recognized that under certain circumstances it may be an investigative necessity to withhold CID deposition transcripts from the deponent. Thus, at the time the statute was passed, members of Congress stated that the Assistant Attorney General may find good cause to withhold a CID transcript in investigations where there is a possibility of :

1. witness intimidation;
2. economic reprisal;
3. the "programmed" formulation of a common defense by possible co-conspirators who "tailor" their testimony to match the evidence held by the government;
4. perjury; or

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[102] See 15 U.S.C. § 1312(i)(4). The witness, who may be accompanied by counsel, can be afforded the requisite opportunity to review and sign the transcript without letting it out of the Division's possession, if that is deemed appropriate under the circumstances.

[103] See 15 U.S.C. § 1312(i)(5).

[104] See 15 U.S.C. § 1312(i)(6).

[105] Cf. infra Section E.6.b(iv) (regarding whether third party documents used in the deposition should be provided as exhibits to the transcript).

5. the circulation of the copy to co-conspirators seeking to orchestrate testimony.[106]

The AAG's authority to determine good cause is not delegable. Accordingly, when an attorney believes that withholding a CID deposition transcript or series of transcripts is appropriate, the attorney should forward a short memorandum to the Office of Operations requesting a good cause determination from the AAG.[107] Such requests should be forwarded as soon as the need to withhold the transcript is identified. The requesting memorandum should succinctly explain the circumstances prompting the request, identify the good cause exception on which the attorney's request is based, and explain the reasons for which the general policy of disclosure should be overridden in this instance. Once a deponent requests a copy of the transcript, any conscious decision to delay release of the transcript can be construed as a decision to withhold.[108]

A deponent may appeal a determination by the AAG not to release a CID deposition transcript. Such appeals are to be made in the United States District Court in which the CID document custodian's office is located.[109] Even when the Division withholds a copy of the transcript, however, CID deponents have an absolute right to inspect the transcript of their CID testimony.[110]

4. Procedures for Issuing CIDs

After a section, task force, or field office has been authorized to conduct a preliminary inquiry into a possible civil antitrust violation, it may request the AAG to issue CIDs. The request is made by forwarding a memorandum to the Chief, explaining the need for the CIDs, requesting a production date, and attaching the requested CID and Schedules. If the CIDs are the first to be issued in the particular

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[106] Congress cited the first three instances of good cause in the Antitrust Civil Process Act Amendments of 1976, H.R. Rep. No. 94-1343, at 14-15 (1976). The first, fourth and fifth situations for withholding the transcript are cited at 123 Cong. Rec. 30,875-76 (Sept. 16, 1976).

[107] In such an instance, the Division attorney should immediately remind the court reporter not to disseminate the transcript to anyone outside the Division.

[108] See 15 U.S.C. § 1312(i)(6); Antitrust Civil Process Act Amendments of 1976, H.R. Rep. No. 94-1343, at App. B (1976) (Letter from AAG Kauper to Chairman Rodino); Testimony of Mark Green, Director, Corporate Accountability Research Group, Antitrust Civil Process Act Amendment, Hearings of the Subcommittee on Monopolies and Commercial Law of the Committee on the Judiciary of H.R. 39, 94th Cong., 1st Sess. 149, 151-52, 156 (1975).

[109] See 15 U.S.C. § 1314(d).

[110] See 15 U.S.C. § 1312(i)(4).

investigation, careful consideration should be given to the potential significance of the matter and the resources it will consume.

Each CID should be prepared on the appropriate form: Civil Investigative Demand-Documentary Material (ATR 154), Civil Investigative Demand-Oral Testimony (ATR 155), Civil Investigative Demand-Written Interrogatories (ATR 156), or Civil Investigative Demand-Documentary Material and Written Interrogatories (ATR 174). These forms are available on the Division computer system.[111] If the CID is for documents and/or written interrogatories, a schedule itemizing the requested documentary material and/or interrogatories must be submitted.

CIDs for corporate documents and interrogatory answers should be addressed to the corporation (rather than to an individual in the corporation), although they may include a notation that they are for the "Attention of" the General Counsel or another individual known to have authority to bind the corporation.

The Chief will review these materials and, if in concurrence, approve the requesting memorandum. A cover memorandum may be attached if the Chief has any additional comments. If the Chief approves the request, the entire package (requesting memorandum, cover memorandum (if any), CIDs, and Schedules) is e-mailed[112] to the Special Assistant who is assigned to work with the particular section, task force, or field office. The path and file name of each document, along with the date the Chief concurred on the issuance, must be included in the package.

The Special Assistant and the appropriate Director of Enforcement review the package, and then forward it with a recommendation to the AAG. The ACPA requires that all CIDs be signed by the Attorney General or the AAG.[113] This authority cannot be delegated. In practice, all CIDs are approved personally by the AAG.[114] Once a CID is signed, it is given an identifying number and logged in by the office of the appropriate Director, which then either returns it to the requesting section, task force, or field office for service, or arranges for service itself. The Director's office generally returns CIDs requested by a Washington component but arranges for service of field office CIDs to

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[111] On WordPerfect 6.1, click "Forms" on the tool bar. Then, under "Civil," select "Civil Investigative Demand Letters," and then click on the button for the appropriate form.

[112] In the event that the package contains more than three separate CIDs, Washington components must forward them to the Special Assistant as hard copies rather than by e-mail.

[113] See 15 U.S.C. § 1312(a).

[114] In the AAG's absence, an Acting AAG will be designated. An Acting AAG can approve and sign CIDs.

avoid the delay inherent in returning the signed CIDs to the field office for service.

When CIDs are returned by the Office of Operations for service, they are given to the lead attorney, who prepares a cover letter.[115] If the CID is addressed to a person whose counsel has already been in contact with the Division with regard to the investigation, a courtesy copy of the covering letter and CID may also be sent by express mail or fax to counsel to enable preparation of the responses without delay.

5. Service of CIDs

The provisions of the ACPA relating to the manner of service, 15 U.S.C. § 1312 (d), (e), and (f), apply equally to all forms of CIDs (i.e., interrogatory, documentary, and oral deposition) and to petitions by the Division under 15 U.S.C. § 1314(a) for enforcement of a CID.

a. Service on Domestic Respondents

In most instances, CIDs to be served "at any place within the territorial jurisdiction of any court of the United States,"[116] are served by mail, i.e., by "depositing [a duly executed] copy in the United States mails, by registered or certified mail, return receipt requested, duly addressed."[117] CIDs for an individual are to be mailed to his or her residence or principal office or place of business.[118] CIDs for a partnership, corporation, association, or other non-natural entity are to be mailed to its principal office or place of business.[119] U.S. Postal Service Express Mail, certified and return receipt requested may be used, but use of private courier or commercial overnight delivery companies does not conform with the statutory service-by-mail requirement and should not be used exclusively. Alternatively, service can be accomplished by personal "delivery" by an "antitrust investigator," e.g., a Division-employed attorney or paralegal,[120] or by a United States marshal or deputy marshal.[121] CIDs for a partnership, corporation, association, or other entity can be served by delivering a duly executed copy to any

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[115] See supra note 73 (providing a sample cover letter).

[116] 15 U.S.C. § 1312(d)(1).

[117] 15 U.S.C. §§ 1312(e)(1)(C), 1312(e)(2)(C).

[118] See 15 U.S.C. § 1312(e)(2)(B).

[119] See 15 U.S.C. § 1312(e)(1)(C).

[120] See 15 U.S.C. § 1311(e).

[121] See 15 U.S.C. § 1312(d)(1).

partner, executive officer, managing agent or general agent thereof, or to any agent thereof authorized by appointment or by law to receive service of process on its behalf,[122] or to its principal office or place of business.[123] CIDs for an individual can be served by delivering a duly executed copy thereof to the individual.[124] Although, per agreement with counsel, a copy of the CID may be provided by a means not specified in the statute (e.g., fax, commercial overnight delivery company), the CID should always be served via one of the statutorily authorized methods.

b. Service on Respondents Situated Abroad

Under the CID statute, even CID respondents situated abroad may be amenable to domestic service. Thus, a foreign corporation can be served by complying with the provisions for service on its domestic subsidiary, if an adequate measure of the foreign parent's control over the domestic subsidiary can be established. Alternatively, if a partner, executive officer, or managing or general agent of the corporation travels to the United States, personal service upon him or her on United States soil is effective service on the foreign corporation. An Immigration and Naturalization Service ("INS") border watch can be arranged so that the person to be personally served upon entry to the country can be intercepted at the border and interviewed as where he or she can be found while here.[125]

The Act also prescribes means of CID service on a person "not to be found within the territorial jurisdiction of any court of the United States," but such service will only be effective if "the courts of the United States can assert jurisdiction over such person consistent with due process."[126] The Act authorizes service on such persons[127] in accordance with any of the means for service prescribed by

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[122] See 15 U.S.C. § 1312(e)(1)(A).

[123] See 15 U.S.C. § 1312(e)(1)(B).

[124] See 15 U.S.C. § 1312(e)(2)(A).

[125] The office of the Deputy Assistant Attorney General for criminal enforcement should be contacted to arrange for a border watch. INS must be given the full name of the foreign nationals for whom it is to look, and telephone numbers where the antitrust investigator(s) to be notified can be reached any time of day or night. INS will interview the foreign national at the time of entry to determine his or her itinerary and to enable personal service. It is important to notify INS to call off a border watch when it is no longer needed to avoid unnecessary interference with anyone's freedom of movement. A sample border watch request letter may found in Chapter VII, Section D.3.

[126] 15 U.S.C. § 1312(d)(2).

[127] See id.

Rule 4(f), Fed. R. Civ. P., for service on individuals in a foreign country.[128] Of the alternatives provided in that rule, service by registered mail, return receipt requested, pursuant to a court order directing such service pursuant to Rule 4(f)(3), has occasionally been successfully invoked.[129]

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[128] 15 U.S.C. § 1312(d)(2) provides for such service "in such manner as the Federal Rules of Civil Procedure prescribe for service in a foreign country." Rule 45(b)(2) and Rule 4(f), Fed. R. Civ. P., both contain provisions prescribing means for service abroad, but an analysis of those provisions indicates that Rule 4(f) is the applicable provision.

[129] Service pursuant to Rule 4(f)(3), Fed. R. Civ. P., can be obtained by submitting to the clerk of the United States District Court for the District of Columbia a duly signed copy of the CID to be served, together with envelopes displaying the proper postage and return receipts, and the following papers:

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE CIVIL INVESTIGATIVE) Misc. Docket
DEMAND NUMBER XXXX) No. 92-

Request for Service of Civil Investigative Demand

Pursuant to 15 U.S.C. § 1312(d)(2), the United States Department of Justice requests that the Clerk of the United States District for the District of Columbia serve by mail, in accordance with Rule 4(f)(3) of the Federal Rules of Civil Procedure, the attached Civil Investigative Demand No. xxxx on [Name, Address].

_____
Jane Doe, D.C. Bar No.

Dated: _____

IN RE: CIVIL INVESTIGATIVE DEMAND MISC. NO. 92-
NO. xxxx

CLERK'S OFFICE
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA
WASHINGTON, D.C. 20002

IN RE: CIVIL INVESTIGATIVE DEMAND
NO. xxxx

CERTIFICATE OF MAILING BY THE CLERK

I hereby certify that I have this xxxx day of [month, year], by Registered Air Mail, return receipt requested, sent a copy of Civil Investigative Demand No. xxxx to [Name, address], as provided by Rule 4(f)(3), Fed. R. Civ. P.

JAMES F. DAVEY, Clerk

While, as the above discussion demonstrates, the CID statute explicitly provides for service upon foreign nationals and entities, in conducting investigations that require documents that are located outside the United States, the Department first considers requests for voluntary cooperation when practical and consistent with enforcement objectives. When compulsory measures are needed, the Department seeks whenever possible to work with the foreign government involved. It is essential that Foreign Commerce Section be notified before service of a CID is attempted, regardless of the means employed, upon a foreign national, corporation, or other entity, or upon a domestic subsidiary thereof.

c. Proof of Service

Proof of service requires a verified return setting forth the manner of service by the individual making service.[130] Where service has been by registered or certified mail, the return must include the signed post office return receipt of delivery.[131] Staff should retain all evidence of service.

6. Confidentiality and Permitted Uses of CID Materials

a. DOJ Use and Outside Disclosure of CID Materials Authorized by the ACPA

While the ACPA permits authorized Department of Justice personnel to use CID material in the performance of their official duties,[132] it provides for only four circumstances under which CID material may be disclosed to third parties without the consent of the producing party. Regulations further governing the use of CID material by Department of Justice personnel are set forth in 28 C.F.R. §§ 49.1-.3.

The ACPA authorizes disclosure of CID material to individuals other than the producing party or authorized Department of Justice personnel without the consent of the producing party as follows:

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by
Deputy Clerk

No hearing or appearance before a judge is required. Rather, the court clerk accomplishes the mailing and returns the signed Certificate of Mailing to us.

[130] See 15 U.S.C. § 1312(f).

[131] See id.

[132] See 15 U.S.C. §1313(c)(2).

(i) to Congress;[133]

(ii) to the FTC, which is bound by the same rules as DOJ with respect to the use of CID material;[134]

(iii) to third parties "in connection with the taking of oral testimony" pursuant to the CID statute;[135] and

(iv) for official use in connection with court cases, grand juries, or a Federal administrative or regulatory proceeding in which the DOJ is involved.[136]

In general, documents, answers to interrogatories, and transcripts of oral testimony obtained pursuant to a CID cannot be disclosed to state, foreign, or other federal agencies (except for the FTC), nor can they be disclosed during the course of interviews with other parties, without the consent of the producing party. 15 U.S.C. § 1313(c)(3). CID materials are also explicitly exempt from disclosure under the Freedom of Information Act, but the CID and schedule issued by the Division are not exempt.[137]

Despite these statutory limitations on disclosure of CID materials, the producing parties often seek to restrict further how the Division may use these materials. Parties seeking to limit the Division's use of their CID materials may either seek the consent of the Division or request that a court enter a protective order.

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[133] See 15 U.S.C. § 1313(c)(3).

[134] See 15 U.S.C. § 1313(d)(2).

[135] See 15 U.S.C. § 1313(c)(2).

[136] See 15 U.S.C. § 1313(d)(1).

[137] See 15 U.S.C. § 1314(g). This FOIA exemption does not apply to non-CID materials, such as "White Papers," that CID respondents may voluntarily submit to the Division in the course of an investigation. For this reason, parties may ask that a CID be issued for such materials.

b. Division Policy and Practice Concerning Requests for Additional Limitations on Use or Disclosure of CID Material

(i) General Policies

As noted above, documents, answers to interrogatories, and transcripts of oral testimony obtained pursuant to a CID may be used internally by authorized officials, employees and agents[138] of the Department of Justice in the performance of their official duties.[139] Copies of CID material may be made for the official use of Department of Justice personnel.[140] The Division's use of CID material is not restricted to the pending investigation.[141] Moreover, as a matter of policy the Division will not agree to restrict its use of CID material to the pending investigation.[142]

Parties producing CID material sometimes seek written commitments from the Division limiting how or when the Division will exercise its statutory authority to disclose CID materials. The Division discourages such additional confidentiality commitments.[143] Parties are not statutorily entitled to such

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[138] See 15 U.S.C. § 1313(c)(2). Authorized agents to whom disclosure of CID material can be made include economic experts, industry specialists, and independent contractors specializing in automated document retrieval. The agent should sign a confidentiality agreement with the Department before the disclosure of any CID material is made; disclosure, however, may be made if necessary before the contract containing payment terms has been fully processed.

[139] See 15 U.S.C. § 1313(c)-(d).

[140] See id.

[141] See infra Section E.9. (discussing the Division's return of CID materials at the end of an investigation).

[142] See 28 C.F.R. §§ 49.1-.3 (governing the use of CID material by the Department of Justice); see also Division Directive ATR 2710.l ("Procedures for Handling Division Documents").

[143] When asked for confidentiality commitments beyond those contained in the statute, staff should consider sending a letter similar to the following:

Dear Mr./Ms. Lawyer

In your letter of [Date] you requested additional assurances of confidentiality beyond those provided in the Civil Investigative Demand ("CID") statute, 15 U.S.C. §§ 1311-1314, and the Freedom of Information Act ("FOIA"), 5 U.S.C. §552, for documents called for by the CID recently served upon [Company Name].

I cannot promise to notify you in advance if a document [Company Name] provided will be used in a CID deposition of a witness not affiliated with your client. The Division is authorized to use CID material without the

commitments, although in some instances courts have issued protective orders limiting how the Division may disclose certain CID material. See infra Section E.6.c. Such additional commitments limit the Division's flexibility and burden the staff with additional procedural requirements. In limited circumstances, however, providing additional commitments may be necessary or appropriate. Requests for such commitments should be considered on a case-by-case basis and should only be granted where there is a clearly demonstrated need. If any such commitment is made, the additional commitment should be defined as narrowly as possible, tailored to the specific request of the party, and confirmed in writing.

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consent of the producing party in "connection with the taking of oral testimony." It is, however, rare that we disclose a document in such a manner. Although it is occasionally useful to use CID materials in a deposition of a third party where the third party has already seen the materials, or is at least generally aware of their substance, it is rarely necessary to use CID materials in connection with a deposition of a third party that is unfamiliar with the contents of those materials. Moreover, the Division has an interest in seeing that competitors do not receive access to each other's confidential information, is sensitive to confidentiality concerns, and does not unnecessarily reveal such information.

You have also represented that [Company Name] considers certain information requested in the CID to be proprietary and confidential. It is the Department's policy to treat confidential business information that is produced as set forth below. "Confidential business information" means trade secrets or other commercial or financial information (a) in which (the company) has a proprietary interest, and (b) which (the company) in good faith designates as commercially or financially sensitive.

It is the Department's policy not to use confidential business information in complaints and accompanying court papers unnecessarily. The Department, however, cannot provide assurance that confidential business information will not be used in such papers, and cannot assure [Company Name] of advance notification of the filing of a complaint or its contents.

If a complaint is filed, it is the Department's policy to notify [Company Name] as soon as is reasonably practicable should it become necessary to use confidential business information for the purpose of seeking preliminary relief. It is also the Department's policy to file under seal any confidential business information used for such purpose, advise the court that [Company Name] has designated the information as confidential, and make reasonable efforts to limit disclosure of the information to the court and outside counsel for the other parties until [Company Name] has had a reasonable opportunity to appear and seek protection for the information.

It is the Department's further policy to notify [Company Name] at the close of the investigation and give it the option of requesting that original documents, if produced, be returned. If copies were produced they will be destroyed unless: (1) they are exhibits; (2) they are relevant to a current or actively contemplated Department investigation or to a pending Freedom of Information Act request; (3**)** a formal request has been made by a state attorney general to inspect and copy them pursuant to Section 4F of the Hart-Scott-Rodino Antitrust Improvements Act, 15 U.S.C. § 15; or, (4) they will be of substantial assistance in the Department's continuing law enforcement responsibilities.

Sincerely,

Pat Attorney

Such additional commitment should be granted only with the approval of the Chief, and all members of the investigative staff should be notified of its existence. The FOIA Unit should also be notified before any such additional commitment is granted to make sure that any additional protection conforms to Division policy. If a staff seeks to use anything other than pre-approved language, it must seek the prior approval of both the FOIA Unit and the appropriate Director of Enforcement. If the agreement involves potential disclosure of materials to Congress, the Legal Policy Section also should be consulted before any promises are made.

(ii) Disclosure to Congress

On several occasions, CID recipients have attempted to obtain a commitment that the Division would refuse to disclose to Congress material produced pursuant to CIDs. The Division has no authority to promise to withhold information from Congress or any authorized committee or subcommittee of Congress and thus cannot make such a promise.[144]

In very limited circumstances, the Division will agree to give "as much notice as is practicable" to a CID recipient before disclosing CID material to Congress. It is ordinarily preferable to explain to the CID recipient that the Division does not unnecessarily release confidential information to Congress, tries to respond to congressional inquiries in a manner that does not disclose such information, and is rarely asked to give CID material to Congress. As noted above, the FOIA Unit should also be consulted to ascertain whether the proposed commitment conforms to Division policy, and both the Legal Policy Section and appropriate Director of Enforcement should be consulted before making any such commitment.

(iii) Disclosure to the Federal Trade Commission

The custodian of CID material is authorized, in response to a written request from the Federal Trade Commission, to deliver copies of CID material to the Commission for use in connection with an investigation or proceeding under the Commission's jurisdiction. CID material furnished to the Commission may only be used by the Commission in such manner and subject to such conditions as apply to the Department of Justice. The Division has discretionary power either to deliver or withhold CID material requested by the FTC.[145]

On occasion, CID recipients have attempted to obtain commitments that the Division will refuse to disclose specified CID material to the Federal Trade Commission. As a policy matter, the Division will not promise to withhold material from the FTC. On limited occasions, the Division will agree to

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[144] See 15 U.S.C. §1313(c).

[145] See 15 U.S.C. §1313(d)(2).

give notice, but only "when practicable," before giving CID material to the FTC. As noted above, staff should consult with the FOIA Unit and the appropriate Director before making any commitment beyond what is contained in the statute.

(iv) Disclosure in the Context of a CID Deposition

The Division is authorized to use CID material[146] without the consent of the producing party "in connection with the taking of oral testimony" in a CID deposition of a third party.[147] Although it is occasionally useful to use CID materials in a deposition of a third party where the third party has already seen the materials, or is at least generally aware of their substance, it is very rarely necessary to use CID materials in connection with a deposition of a third party that is unfamiliar with the contents of those materials. Nevertheless, some CID recipients ask the Division to agree to limit the use of CID documents in third-party depositions. Parties expressing concern as to such use should be told that the Division has an interest in seeing that competitors do not receive access to each other's confidential information, is sensitive to confidentiality concerns, and does not unnecessarily reveal such information.

In some special circumstances, the Division has agreed to provide advance notice, "if practicable," before using the producing party's CID material in a third party deposition. The notice may be a specific number of days or simply for a period of time that is "reasonable under the circumstances." Generally, this commitment should only be offered for a very limited number of documents that the producing party reasonably designates as "restricted confidential" or "highly confidential." The purpose for offering such notice is to give the producing party the time to object or seek a protective order. The disadvantage to offering such a commitment is that it reduces the Division's flexibility at the deposition and may require the Division to identify to third parties persons whose depositions it is taking.

If CID material not produced by the deponent is used in a deposition, staff should consider carefully whether the deponent should be permitted to retain a copy of the material. Although the deponent has a right to review the material in connection with his or her review of the transcript, the Division has discretion as to whether to allow the deponent to keep a copy of the material. Division policy is to protect the legitimate confidentiality interests of parties and thereby encourage compliance with CIDs; thus, in circumstances where the deponent is not entirely aware of the substance of the document and the third party producer could reasonably object to the document being retained by the

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[146] See 15 U.S.C. § 1313(c)(2). In contrast, the Division is not authorized under the antitrust statutes to use material submitted in response to a Second Request under the Hart-Scott-Rodino Act filing in connection with the deposition of a person that did not submit the material.

[147] CID material may also be used in a deposition of the party producing the material without the consent of that party.

deponent, the deponent should not be permitted to retain a copy of the document.[148] In such a case the preferred practice is either to: (a) allow the deponent to receive a copy of the document as an exhibit while reviewing the transcript, but require the exhibit to be returned with a signed affirmation (or letter from counsel) stating that no copies have been made or (b) allow the deponent to receive a copy of the transcript without the exhibit attached, but permitting review of the document at Division (or other Department of Justice) offices if such a review of the document is necessary to the review of the transcript.[149] On the other hand, if the deponent is already aware of the substance of the document in question, it is permissible to allow the deponent to receive and retain a copy of the transcript with the third party document attached as an exhibit; providing the third party document as an exhibit is an appropriate courtesy and may make it more convenient for the deponent to review, correct, and inspect the transcript.[150]

(v) Disclosure in Judicial or Administrative Proceedings

(a) Agreements Concerning Notice

The Division is authorized, pursuant to 15 U.S.C. § 1313(d)(1), to use CID material in connection with any court cases, grand jury, or Federal administrative or regulatory proceeding in which the Division is involved. Although the Division's policy is to try to avoid using competitively sensitive information in complaints or openly discussing competitively sensitive information, the Division will not agree to refrain from disclosing CID material in a judicial or administrative proceeding.

If competitively sensitive information is to be used in a pleading, the Division's general policy is to make reasonable efforts to allow the party that produced the material the opportunity to seek a protective order. Or, the Division may voluntarily file the document or portion of the pleading under seal. Notifying parties in writing that this is the Division's general practice is preferable to making a specific commitment to provide notice. This is because promises regarding how and when the Division may use CID material in judicial and administrative proceedings may impose unnecessary procedural

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[148] Examples of this might include notes of a meeting in which the deponent participated produced by another participant and that include observations, reflections, or commentary; a document that the staff initially believes the deponent authored or read but that the deponent denies having seen; etc.

[149] Cf. supra Section E.3.c(vi) (discussing when the Division may withhold the transcript from the deponent).

[150] Examples falling into this category include: depositions where a document authored or received by the deponent was produced by his or her former employer; an agreement signed by the deponent where the copy of the agreement was produced by the other party to the agreement; correspondence involving the deponent or his or firm; widely circulated newsletters that the deponent likely read; etc.

burdens on the staff and limit the use of material under circumstances that could not be foreseen at the time the promise was made.

On limited occasions, the Division has agreed to certain limitations on its use of CID material in judicial or administrative proceedings. These agreements have been in the form of promises:

1) to notify the producing party in advance, "to the extent that it is reasonably practicable" that we plan to use CID information produced by the party in a proceeding or that we have filed a complaint;

2) to make "reasonable efforts" to notify the producing party before turning over material pursuant to a discovery request in litigation in order to provide the party with a reasonable opportunity to seek a protective order;

3) to file under seal any information from a very limited number of documents containing CID information the producing party has reasonably designated "highly confidential" or "restricted confidential"; and

4) not to oppose the party's appearance to seek a protective order or to use the Division's best efforts to secure a reasonable protective order.

If an agreement regarding notice[151] is made, it should be as limited as possible and apply only to information or documentary material that the party, for legitimate reasons, designates as "highly confidential" or "restricted confidential."

(b) Protective Orders During the Investigatory Stage

Producing parties that are not satisfied with the protection offered under the statute or by consent of the Division may seek a protective order issued by a court. Courts usually will issue such protective orders once a case is filed, and, on occasion, even during the investigative stage. In Aluminum Co. of America v. United States Dep't of Justice,[152] the court held that it was within its power to issue a protective order to limit disclosure to third parties of confidential information obtained by the Division through the production of documents in response to a CID. The Aluminum opinion was

[151] Giving such notice should only be agreed to with parties that agree not to seek declaratory relief.

[152] 444 F. Supp. 1342 (D.D.C. 1978).

followed by the Second Circuit in United States v. GAF Corporation.[153]
0. Above, 535 F. Supp. at 413.[154]

(c) Discovery/Protective Orders During Proceedings[155]

Once a case is filed, the use of CID material in that case will typically be governed by a protective order issued by the court in which the suit is pending. Whenever a civil action is commenced based on information obtained by CID, the defendants in that action may invoke their full discovery rights under the Federal Rules of Civil Procedure and obtain CID information gathered in the investigation that is relevant to their defense.[156] During pre-trial discovery, parties will typically request that some or all of this material be provided either voluntary or by compulsory process. In the past, when some producers of CID materials have sought to prevent disclosure of their material in litigation, the Division has taken the position that they are discoverable.

Although defendants have the right to discover any CID materials obtained by the Division during the investigation that resulted in the civil litigation to which they are a party--subject to any limitations on discovery provided by the Federal Rules of Civil Procedure and any court-imposed protective order--defendants may also attempt to discover CID materials obtained by the Division during the course of other investigations. The Division's position with respect to a discovery request

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[153] 596 F.2d 10 (2d Cir. 1979). Accord Finnell v. United States Dep't of Justice, 535 F. Supp. 410, 413 (D. Kan. 1982).

[155] See also infra Chapter IV, Section C.

[156] The House Report on the 1976 amendments to the ACPA noted that the defendants will thus be able fully to protect their rights at trial by interrogating, cross-examining, and impeaching CID witnesses. The House Report also noted that the scope of civil discovery is not unlimited and that the court has broad discretion under the Federal Rules to set limits and conditions on discovery, typically by issuing a protective order. See H.R. Rep. No. 94-1343, at 2610 (1976).

for CID materials from another investigation is that CID confidentiality continues to apply to such materials, and they are not subject to discovery, unless: (1) the materials being sought have been made public during the course of prior litigation before a court or Federal administrative or regulatory agency, (2) the litigant seeking discovery has the consent of the person who produced the CID materials to the disclosure, or (3) the Division has used such materials during the course of the instant pre-trial investigation or intends to make use of them at trial.[157]

The Division's position on the reasonableness of protective orders is guided by balancing the public interest in conducting litigation in the open to the greatest extent possible[158] against the harm to competition from having competitively sensitive information disclosed to competitors. Staffs should also keep in mind that the disclosure of third party confidential business information obtained through CIDs may cause third party CID recipients to be less cooperative with the Division in the future.

Typical protective order provisions:

1) provide both litigating and third parties with the opportunity to designate material as confidential if they have not already done so;

2) require parties to restrict their use of any confidential information they have obtained to the preparation and trial of the pending action;

3) restrict access to confidential material and information to the Division, the parties' outside counsel, and certain consultants, denying access by

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[157] Use during the investigation means more than simply perusing the materials to determine whether they are relevant; they must be put to some more direct use during the pretrial stage. The Division essentially adheres to the position adopted by Judge Greene in United States. v. AT&T Co., 86 F.R.D. 603, 647-48 (D.D.C. 1979), concerning the discoverability of CID materials produced in other investigations.

[158] See 15 U.S.C. § 30; 28 C.F.R. § 50.9.

the defendants' business personnel to competitively sensitive documents from competitors;

4) require any court submission that contains confidential information or material to be placed under seal, with properly redacted copies available to the public; and

5) require that the producing party be given an opportunity to request in camera treatment before disclosure any confidential material or information at trial.

Regardless of whether the Division has filed a case, CID deposition transcripts may be discoverable from the deponent by a third party,[159] and antitrust investigators should so inform a deponent who is concerned about confidentiality. A Division attorney who has sufficient concern about keeping the information in a deposition from the subject of the investigation may want to consider withholding the copy of the transcript from the witness. See supra Section E.3.c(vi).

7. CID Custodians and Deputy Custodians

The Act requires that the AAG designate an antitrust investigator to serve as custodian, and such additional antitrust investigators as he/she may from time to time determine to be necessary to act as deputy custodians, of documentary material, answers to interrogatories, and transcripts or oral testimony received under the Act.[160] When a CID is issued, the general Division practice is to appoint

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[159] In re NASDAQ Market-Makers Antitrust Litig., 929 F. Supp. 723, 727 (S.D.N.Y. 1996); In re Air Passenger Computer Reservation Sys. Antitrust Litig., 116 F.R.D. 390, 393 (C.D. Cal. 1986). Although the issue is not settled, the government may be able to assert a qualified privilege over such materials. See McCray v. Illinois, 386 U.S. 300, 309-11 (1967) (citing Vogel v. Gruaz, 110 U.S. 311 (1884)) and Three Crown Ltd. Partnership v. Salomon Bros., Inc., 1993 Trade Cas. (CCH) ¶ 70,320, at 70,665 (S.D.N.Y. 1993).

[160] See 15 U.S.C. § 1313(a).

the Chief of the requesting section, task force, or field office as the custodian and one or two of the trial attorneys on the investigative staff to serve as deputy custodian(s). In the event of the death, disability, separation from government service, or the official relief of a custodian (e.g., if the investigation is transferred to another section), the AAG is required to designate another antitrust investigator to serve as a successor custodian and to notify the CID respondent of this new designation.[161] A letter over the AAG's signature should be sent to the producer of the materials announcing the change.

The custodian and deputy custodian(s) are responsible for taking physical possession of the documentary material, interrogatory answers, and transcripts of oral testimony produced pursuant to the CID, for protecting these materials against unauthorized use or disclosure, and for their eventual return.[162] Persons appointed to these positions should arrange for their removal when transfers, reassignments, resignations, or the like no longer permit them to carry out their custodial obligations.

8. Grounds for Objection and Judicial Proceedings Concerning CIDs

a. General Standards - Both Grand Jury and Civil Discovery Standards Apply

The ACPA provides that no CID shall require the production of any documentary material, the submission of any answers to written interrogatories, or the giving of any oral testimony that would be protected from disclosure under either (1) the standards applicable to grand jury subpoenas or (2) the standards applicable to discovery requests under the Federal Rules of Civil Procedure "to the extent that the application of [civil discovery standards] to any such demand is

[161] See 15 U.S.C. § 1313(f).

[162] See 15 U.S.C. § 1313(c).

appropriate and consistent with the provisions and purposes" of the ACPA.[163]

The civil discovery protections were added to the existing grand jury subpoena standards in 1976.[164] Since that date, CID recipients have litigated the issue of which standard applies when the standard governing the extent of permissible civil discovery is in conflict with the standard that applies in grand jury investigations. The legislative history of the 1976 amendments and the cases recognize that, in general, civil antitrust investigations usually more closely resemble grand jury investigations than typical civil discovery because they are usually broader in scope and less precise in nature than typical civil discovery. Consequently, these authorities generally avoid rigid application of post-complaint civil discovery standards to CIDs. Successful challenges to CIDs are rare and generally have been limited to burden and relevance issues.

The House Report on the 1976 amendments stressed that their purpose was to increase the effectiveness of antitrust investigations and that application of civil discovery standards must be consistent with this purpose.[165] According to the Second Circuit, this Report "reveals a preference for [applying] the less stringent grand jury subpoena standard, 'tailored as it is to reflect the broader scope and less precise nature of investigations [as compared to adjudications].'"[166]

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[163] 15 U.S.C. § 1312(c)(l).

[164] See Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("1976 amendments"), 15 U.S.C. § 18a.

[165] See H.R. Rep. No. 94-1343, at 2606 (1976). The House Report specifically cited one category of discovery objections permitted under the Federal Rules of Civil Procedure that may not be raised against a CID: objections based not on the burdensome or irrelevant nature of the CID but instead on the various procedural requirements of the civil rules, such as rights of notification, intervention, confrontation, and cross-examination. See id. at 2606-07.

[166] Associated Container Transp. (Australia Ltd.) v. United States, 705 F.2d 53, 58 (2d Cir. 1983). The Second Circuit reasoned that civil discovery standards are tailored to meet the requirements of formal, adversary, adjudicatory proceedings involving detailed pleadings setting forth specific allegations and responses. See id. at 58 n.9. Since the issues in adjudications will be more narrowly-drawn and

Senator Philip Hart's explanation of the intent behind the 1976 amendments also supports the theory that civil discovery standards have limited application to CIDs:

> We included the House language . . . because the qualification in that language limited the application of discovery standards in the FRCP to those that are appropriate and consistent with the purposes of the Act. This important qualification provides assurances that unreasonable constraints will not be applied to the Department's investigations. See H. Rep. 94-1343. We view the FRCP standard as essentially incorporating the "oppressive" and "burdensome" standards of Rule 26(c). So limited, this standard is consistent with the purposes underlying the Act and would not breed unnecessary litigation by persons seeking to thwart civil antitrust investigations.[167]0. *Id*; *see United States v. Witmer*, 835 F.

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well-defined than in an investigation, the grand jury standard is more appropriately applied to antitrust investigations. See id.

[167] Cong. Rec. S15,416 (daily ed. Sept. 8, 1976) (statement of Sen. Hart). Additionally, Senator Hart outlined the "important" factors that should be taken into account in deciding which civil discovery grounds are "appropriate and consistent" for application to CIDs:

> (l) Investigations -- unlike pre-trial discovery and litigation -- are not adversary or adjudicatory;
>
> (2) Pre-trial discovery and litigation have different purposes, a narrower scope, and more clearly-defined issues than investigations have;
>
> (3) Parties to pre-trial discovery and litigation are clearly identified, while there are no parties in investigations -- possible antitrust wrongdoers are seldom firmly identified until way late in the investigation;
>
> (4) Parties in pre-trial discovery and litigation have certain rights with respect to notification, participation, intervention, confrontation, and cross-examination, whereas there are no such rights (even for targets) in investigations;
>
> (5) Narrow, technical, or merely procedural objections which frustrate expeditious [sic] civil antitrust investigations are normally not "appropriate and consistent;"
>
> (6) Relevance in an investigation may be different from relevance in pre-trial discovery of [sic] litigation -- once litigation is begun, the interests and scope of the matter tend to be much more specific and refined than in investigations; and

Supp. 201, 207 (M.D.Pa. 1993) *vacated in part on other grounds on reconsideration in United States v. Witmer*, 835 F. Supp. 208, *aff'd* 30 F.3d 1489 (3rd Cir. 1994) (noting that to the extent the 1976 amendments cite with approval *Cleveland Trust* and *Hyster*, *see below*, "this court believes that Congress intended to approve the use of discovery rules primarily as a source of protection for privileged information and from vexations or overbroad requests").[168]

The standards applicable to grand jury subpoenas and to civil discovery requests are comprehensively analyzed in the authorities cited in the footnote below.[169] In addition to the Second Circuit's opinion in Associated Container, at least one other post-1976 court decision specifically refers to grand jury subpoena standards as more appropriate to antitrust investigations. Maccaferri Gabions, Inc. v. United States[170] holds that CIDs cannot contain any requirement that would be considered unreasonable if contained in a grand jury subpoena duces tecum.

There is little other case precedent concerning the application of civil discovery standards to CIDs, but where such objections have been raised, the courts, like Senator Hart, have focused on burden and relevance. See, e.g.,

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(7) Civil antitrust investigations are nonetheless investigations, and they are in most respects close [sic] to grand jury investigations than they are to pre-trial discovery or litigation.

[169] Antitrust Division Grand Jury Practice Manual (1991); Charles Alan Wright, Federal Practice and Procedure: Criminal 2d §§ 109, 111.1, 275 (2d ed. 1982); 9A Charles Alan Wright et al., Federal Practice & Procedure: Civil 2d § 2451 (2d ed. 1995) (Rules 26, 34, and 45); 25 James Wm. Moore, Moore's Federal Practice, ¶ 617.08 (3d ed. 1997) ("Moore's"); 6 Moore's chapter 26; 7 Moore's chapter 34; 9 Moore's chapter 45.

[170] 938 F. Supp 311, 314 (D. Md. 1995) (citing Petition of Gold Bond Stamp Co., 221 F. Supp. 391 (D. Minn. 1963), aff'd per curiam, 325 F.2d 1018 (8th Cir. 1964)).

Material Handling Institute, Inc. v. McLaren[171] (relevancy and discovery of records maintained in non-documentary form); Maccaferri[172] (citing Finnell for the proposition that appropriately modified overbroad or unduly burdensome CIDs are enforceable); Finnell[173] (objections on grounds, inter alia, of burden and relevance denied, with court noting that"[t]he Government has a relatively light burden in proving the relevance of CIDs to ongoing investigation"); Phoenix Board of Realtors, Inc. v. United States Dep't of Justice[174] (CIDs held not to be unduly burdensome where Division attorneys had repeatedly indicated a willingness to negotiate with recipient regarding burden and scope of demands); Australia/Eastern U.S.A. Shipping Conference v. United States[175] (objections may be made if demand is too broad and sweeping, not relevant, not limited to reasonable time period, burdensome, privileged); First Multiple Listing Service v. Shenefield[176] (certain original demands found to be burdensome, but compliance ordered after modification of demands); Sterling Drug, Inc. v. Clark[177] (CID requiring second search of company files not unduly burdensome); Petition of CBS, Inc.[178] (reasonableness of demand); Gold Bond[179] (CID must be in writing and relevant to antitrust investigation, state nature of conduct constituting alleged violation, state provision of applicable law, and

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[171] 426 F.2d 90, 92-93 (3d Cir.), cert. denied, 400 U.S. 826 (1970) .

[172] 938 F. Supp. at 314.

[173] 535 F. Supp. 410, 412 (D. Kan. 1982).

[174] 521 F. Supp. 828, 832 (D. Ariz. 1981).

[175] 1982-1 Trade Cas. (CCH) ¶ 64,721, at 74,062 (D.D.C. 1981), modified, 537 F. Supp. 807 (D.D.C. 1982), vacated as moot, Nos. 82-1516, 82-1683 (D.C. Cir. Aug. 27, 1986).

[176] 1980-81 Trade Cas. (CCH) ¶ 63,661 (N.D. Ga. 1980).

[177] 1968 Trade Cas. (CCH) ¶ 72,629 (S.D.N.Y. 1968).

[178] 235 F. Supp. 684, 688 (S.D.N.Y. 1968).

[179] 221 F. Supp. at 394.

define documents sought with sufficient particularity); Houston Industries v. Kaufman[180] (relevance determination of Justice Department to be given wide latitude).

b. Objections Based on Procedural Requirements of the Act

In addition to objections on grounds of the applicable standards, CID recipients have objected on grounds of failure to comply with the Act's procedures and requirements. For example, the Act requires that each CID state the nature of the conduct, activity, or proposed action that is under investigation and the provision of law that is applicable to the investigation.[181] In the first of several cases in which this challenge was made, Gold Bond, the Division alleged that it was investigating "restrictive practices and acquisitions involving the dispensing, supplying, sale or furnishing of trading stamps and the purchase and sale of goods and services in connection therewith."[182] The court overruled recipient's motion to quash, noting that the sufficiency of the description must be in accordance with the Act's purpose to enable the Attorney General to (1) determine whether there was a violation of the antitrust laws, and if so, (2) properly to allege the violation in a civil complaint. From this, the court concluded:

> Necessarily, therefore, the nature of the conduct [under investigation] must be stated in general terms. To insist upon too much specificity with regard to the requirement of this section would defeat the purpose of the Act, and an overly strict interpretation of this section would only breed litigation and encourage everyone investigated to

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[180] Civ. No. H-95-5237, 1996 WL 580418 (S.D. Tex. March 17, 1996).

[181] See 15 U.S.C. § 1312(b)(l).

[182] 221 F. Supp. at 397.

challenge the sufficiency of the notice.[183]

Since the Gold Bond decision, at least seven cases have involved challenges to the adequacy of description of the investigation.[184] In each instance, the Gold Bond decision was followed and the descriptions were found to be satisfactory. See, e.g., Material Handling Institute[185] (holding that "possible violation of Section l of the Sherman Act by a 'contract or combination in unreasonable restraint of trade'" presents serious concern as to adequacy, but is rendered legally sufficient by subsequent correspondence and conversations between the government and the recipient prior to issuance of CID); Lightning Rod Manufacturers Ass'n v. Staal[186] (alleging "conspiracy to restrain trade by fixing the prices of lightning protection systems and components thereof and by conspiring to refuse to deal with a purchaser of components thereof; conspiracy to monopolize by agreeing to exclude a seller of lightning protection systems from the sale thereof"); Hyster Co. v. United States[187] (alleging "concerted action with manufacturers of tractor equipment, accessories and parts to control production and distribution, and restrictions upon pricing and distribution of those products"); Maccaferri Gabions v. United States[188] (alleging "violation of §§ 1, 2 of the Sherman Act; § 3 of the Clayton Act by conduct of activities of the following nature: Agreements and conduct restraining trade in the gabion and

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[183] Id.

[184] In the course of the debates on the 1976 amendments to the Act, Chairman Rodino stated that the intention of the compromise bill was to carry forward the Gold Bond Stamp Co. standard as it had evolved under the 1962 Act. 123 Cong. Rec. H10,292 (daily ed. Sept. 16, 1976).

[185] 426 F.2d at 92.

[186] 339 F.2d 346, 348 (7th Cir. 1964).

[187] 338 F.2d 183, 187 n.4 (9th Cir. 1964).

[188] 938 F. Supp. 311, 314 (D. Md. 1995).

gabion fastening industries"); Finnell[189] (alleging "restraints of trade in the sale of used automotive parts" as supplemented by conversations between CID recipient and Division attorney); First Multiple Listing Service v. Shenefield[190] (holding reference to "restrictive membership and other anticompetitive practices in connection with the operation of a real estate multiple listing service" sufficient in light of prior informal communication between Division and CID recipient); Petition of Emprise Corp.[191] (alleging "the use by Emprise Corporation or its subsidiaries or affiliates of lending power or other collateral inducements to obtain concession rights at sports arenas with the effect of foreclosing its competitors from a substantial volume of interstate commerce").

c. Objections Based on the Government's Motives

As with other types of discovery, CIDs may be quashed if they are not issued in good faith. While a presumption of regularity applies to the issuance of CIDs,[192] it has been held that a CID may be quashed if it is issued for the purpose of intimidating or harassing the recipient. In Chattanooga Pharmaceutical Ass'n v. United States Dep't of Justice,[193] the government declined to answer the recipient's allegations that the purpose of the CID was to intimidate and harass the recipient into terminating a pending suit for enforcement of a state fair trade act. Since the government did not respond, the court held that the allegations were admitted and set aside the CID. Subsequently, in American

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[189] 535 F. Supp. at 412.

[190] 1980-81 Trade Cas. (CCH) ¶ 63,661, at 77,550 (N.D. Ga. 1980).

[191] 344 F. Supp. 319, 322 (W.D.N.Y. 1972).

[192] See Finnell, 535 F. Supp. at 411; accord Hyster Co., 338 F.2d at 187; see also Lightning Rod Manufacturers Ass'n, 339 F.2d at 347; Maccaferri, 938 F. Supp. at 314.

[193] 358 F.2d 864 (6th Cir. 1966).

Pharmaceutical Ass'n v. United States Dep't of Justice,[194] recipients similarly charged that CIDs were issued for the purpose of harassing the recipients. The motions to quash the CIDs were denied, however, when the AAG filed an unrefuted affidavit stating why the CIDs were issued and denying any intent or purpose to harass or bring duress on recipients.

Recipients have challenged CIDs and asked for discovery[195] on the grounds that they were allegedly issued in response to outside political interference and pressure or to pay off a political debt and were not in a bona fide attempt to determine whether a violation occurred. In Petition of The Cleveland Trust Co.,[196] the court applied grand jury standards applicable to issuance of a subpoena duces tecum to hold that recipient was entitled to certain discovery to establish that the investigation was not a bona fide attempt to ascertain an antitrust violation.[197] Similar issues were raised, but different results reached, in the Emprise case, where the court denied discovery to CID recipients who had charged improper motives on the part of the government, but the Acting AAG denied the charges by affidavit.[198] In Finnell, the court denied discovery on the

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[194] 344 F. Supp. 9 (E.D. Mich. 1971), aff'd, 467 F.2d 1290 (6th Cir. 1972).

[195] Requests by CID recipients to serve discovery on the Division are discussed in more detail below. See infra Section E.8.h.

[196] 1972 Trade Cas. (CCH) ¶ 73,991, at 92,122 (N.D. Ohio 1969). But see United States v. Cotton Valley Operators Comm., 75 F. Supp. 1, 6 (W.D. La. 1948) (holding that evidence that antitrust suit was induced by political considerations and to pay a political debt is irrelevant because the court must award judgment, even though the case may have been politically motivated, if evidence supported the government's allegations); Finnell, 535 F. Supp. at 413 ("We would note that the genesis of an investigation does not appear important to the validity of the CIDs as long as the investigation and the CIDs are pursued in good faith").

[197] Cleveland Trust, 1972 Trade Case. (CCH) at 92,122.

[198] Emprise, 344 F. Supp. at 321-22. Petitioner sought, as an alternative to quashing the CID, to address interrogatories to the Antitrust Division to determine if an improper purpose existed. The court concluded that the AAG's affidavit answered the question of improper motives and that the

basis of the Division section Chief's affidavit rebutting a charge that the allegation that recipients were being harassed for opposing certain legislation.[199] In Maccaferri, the court denied discovery on the basis of an Antitrust Division statement denying improper purpose in issuing a CID and its own examination of each of petitioner's grounds to see if any rational basis existed to believe that discovery would lead to evidence establishing improper purpose.[200]

d. Objections Based on Jurisdictional Grounds

A valid ground for objecting to a CID is that the Division has no jurisdiction to conduct an investigation.[201] Investigations may, however, be conducted on any matter within the scope of the Division's authority.[202] Probable cause to believe that any particular violation has occurred is not necessary.[203] Moreover, the legislative history to the 1976 amendments stresses that the scope of many antitrust exemptions is not precisely clear, and in many cases the applicability of an asserted exemption may be a central issue in the case. The House Report to

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interrogatories were, therefore, neither necessary nor appropriate. In so holding, the court distinguished Cleveland Trust which permitted limited interrogatories to the Division seeking the identity of the persons who worked on the preparation of the CID and who participated in the decision to issue the demand. See infra Section E.8.h (providing a general discussion of discovery in proceedings to enforce or quash a CID).

[199] 535 F. Supp. at 413.

[200] 938 F. Supp. at 315-319.

[201] See Phoenix Bd. of Realtors v. United States Dep't of Justice, 521 F. Supp. 828, at 830 (holding that "an activity which is exempt from antitrust laws cannot form the basis of an antitrust investigation"); accord Associated Container Transp. (Australia Ltd.) v. United States, 705 F.2d 53, 58 (2d Cir. 1983).

[202] Australia/Eastern U.S.A. Shipping Conference v. United States, 1982-1 Trade Cas. (CCH) ¶ 64,721, at 74,064 (D.D.C. 1981), modified, 537 F. Supp. 807 (D.D.C. 1982), vacated as moot, Nos. 82-1516, 82-1683 (D.C. Cir. Aug. 27, 1986).

[203] See id.

the 1976 amendments concluded that the mere assertion of an exemption should not be allowed to halt the investigation.[204]

The few cases that address challenges to CIDs on grounds that the conduct is exempt from, or outside the scope of, the antitrust laws, allow such challenges only when the exemption is clear and where no factual development is required to determine the issue.[205] In other words, the Division may issue a CID to determine whether there is a factual basis for a claim of exemption.

In United States v. Time Warner, Misc. No. 94-338 (HHG) (D.D.C. Jan. 22, 1997), the court ordered CIDs enforced despite the recipients' claim that their conduct was exempt from the antitrust laws under the Foreign Trade Antitrust Improvements Act. The court, relying in part on Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 209 (1946), suggested that the Division need not affirmatively establish the basis for its subject matter jurisdiction in order to conduct an investigation, but rather, could use CIDs to determine whether the purported antitrust exemption was applicable. In Associated Container,[206] CIDs were enforced over a claim that the activities under investigation were exempt under the Shipping Act,[207] the Noerr-Pennington doctrine, and Act of State doctrine. The court reasoned that the Division's utilization of its investigative authority was necessary to determine whether

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[204] See H.R. Rep. No. 94-1343, at 2606 (1976).

[205] Amateur Softball Ass'n of America v. United States, 467 F.2d 312 (10th Cir. 1972) (holding that CID recipient's mere assertions that baseball exemption covers softball and amateur athletics and that it is not engaged in commerce does not prevent investigation and inquiry into antitrust issues raised); Australia/ Eastern U.S.A., 1982-1 Trade Cas. (CCH) at 74,062 (holding that where the question of antitrust coverage is not absolutely determined by authority, and facts surrounding coverage are unresolved, investigation is authorized).

[206] 705 F.2d at 58-60.

[207] The Shipping Act of 1984 specifically exempts ocean carrier conference agreements and related activities from the ACPA and from the antitrust laws. See 46 U.S.C. §§ 1702(2), 1706(a). In an unreported recommended decision by a magistrate in the Eastern District of Louisiana, subsequently adopted by the court, the Division's petition to enforce a CID against an ocean carrier was granted on the ground that the documents sought, which related to service contracts between an ocean carrier and shippers' associations, were not covered by the exemption. Lykes Bros. S.S. Co., Inc. v. Bingaman, No. 94-CV-2113 (E.D. La. Sept. 12, 1994).

the companies qualified for the exemptions. In Houston Industries v. Kaufman,[208] the court came to a similar conclusion with regard to the Noerr-Pennington and state action doctrines. In Phoenix Board of Realtors,[209] the court refused to quash CIDs in a case where the CID recipient argued that its conduct was exempt (a) because it had been "sanctioned" by the Department of Justice in consent decrees in other cases, and (b) because the Department was collaterally estopped from challenging it. However, in Australia/Eastern U.S.A. Shipping Conference v. United States,[210] the district court quashed parts of CIDs that sought material relating to Noerr-Pennington-protected conduct on the grounds that, in light of First Amendment values, the government failed to articulate a showing of need other than "official curiosity." The court held, however, that if the Government could show that the material sought was strongly needed to confirm or prove specific suspected violations of the antitrust laws, the balance between First Amendment values and the need for discovery would tip in the Government's favor.[211]

e. Objections Based on Pre-existing Protective Orders

A CID for the products of discovery supersedes any inconsistent court order, rule, or provision of law preventing or restraining disclosure of such discovery product.[212] However, the Division must serve a copy of the CID upon the person from whom the discovery originally was obtained,[213] and such a demand shall not be returned or returnable by the recipient until twenty (20) days after a copy of the

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[208] Civ. No. H-95-5237, 1996 WL 580418 (S.D. Tex. March 17, 1996).

[209] See 521 F. Supp. at 830.

[210] 537 F. Supp. 807, 812 (D.D.C. 1982), vacated as moot, Nos. 82-1516, 82-1683 (D.C. Cir. Aug. 27, 1986).

[211] See id. Cross-appeals were filed in Australia/Eastern U.S.A. and the case was argued before the D.C. Circuit Court of Appeals. The case remained undecided for several years and the Division eventually withdrew the CIDs in question. The D.C. Circuit dismissed the appeal as moot and vacated the district court decision. See Australia/Eastern U.S.A. Shipping Conference v. United States Nos. 82-1516, 82-1683 (D.C. Cir. Aug. 27, 1986) (unpublished order).

[212] See 15 U.S.C. § 1312(c)(2). This section also provides that the disclosure to the Division of a product of discovery, pursuant to an express demand for products of discovery, does not constitute a waiver of any right or privilege, such as the work product privilege.

[213] See 15 U.S.C. § 1312(a).

demand has been served upon the originator[214] to enable the person from whom the products of discovery were obtained to seek additional protection.

The confidentiality protection for products of discovery extends to the person from whom discovery was obtained,[215] and that person has standing to seek a court order requiring the custodian of the CID material to perform the duties imposed by the Act.[216] Finally, the person from whom the discovery was obtained may file a petition to set aside or modify the demand in the district court where the proceeding in which the discovery was obtained is or was last pending.[217]

f. Miscellaneous Objections

Courts have held that CIDs should not be quashed nor recipients relieved of their duty to respond based on recipient's objections that the information and documents sought were in the possession of another federal agency.[218] At least one court also has refused to set aside CIDs based on the recipient's objection that another federal agency had primary jurisdiction over the activity and was conducting an investigation that duplicated the Division's investigation.[219]

g. Judicial Proceedings to Enforce or Quash CIDs

A recipient who objects to a CID has two options: to refuse to respond to the CID, or to file a

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[214] See 15 U.S.C. § 1312(b).

[215] See 15 U.S.C. § 1313 (c)(3).

[216] See 15 U.S.C. § 1314(d).

[217] See 15 U.S.C. § 1314 (c).

[218] See Phoenix Bd. of Realtors v. United States Dep't of Justice, 521 F. Supp. 828 (D. Ariz. 1981) (court would not quash subpoenas even though information and documents were in the hands of the Federal Trade Commission and could be obtained by the Division); accord Petition of CBS, Inc., 235 F. Supp. 684 (S.D.N.Y. 1964); see also Australia/Eastern U.S.A. Shipping Conference v. United States, 1982-1 Trade Cas. (CCH) ¶ 64,721 (D.D.C. 1981) (requests for information already provided to another federal agency were not found to be unreasonable), modified, 537 F. Supp. 807 (D.D.C. 1982), vacated as moot, Nos. 82-1516, 82-1683 (D.C. Cir. Aug. 27, 1986).

[219] See Australia/Eastern U.S.A., 1982-1 Trade Cas. (CCH) ¶ 64,721, at 74,066.

petition to quash or modify the CID.[220] If the recipient follows the first option, the Division must petition for enforcement of the CID if the Division wishes to pursue the matter. If the recipient chooses to follow the second option, he/she must file a petition for an order modifying or setting aside the CID within 20 days after the CID is served or at any time before the specified return date, whichever period is shorter.[221] The time allowed for compliance does not run during the pendency of a petition, but the petitioner must comply with portions of the CID not sought to be modified or set aside.[222]

Where a CID expressly seeks a product of discovery and where the person from whom the discovery was obtained objects to the CID, the procedures are somewhat different. These procedures are explained above. See supra Section E.8.e.

Petition by the Division for enforcement should be drafted in accordance with the advice of the relevant United States Attorney's Office as to local forms and practice. Unless local practice is to the contrary, the Petition should be captioned United States of America, Petitioner v. (Name of CID Recipient), Respondent. The petition should be supported by a memorandum setting forth the factual and legal basis for enforcement of the CID. The recipient must be served with a copy of the petition. Service of such petitions may be accomplished by any of the means provided for service of CIDs.[223] The proper venue for a petition by the Division to enforce, as well as by the respondent to modify or quash, is any judicial district within which the recipient resides, is found, or transacts business.[224]

h. Discovery By CID Recipient Against the Division

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[220] If a recipient objects to only part of a CID, he/she must comply with the unobjectionable parts. See H.R. Rep. No. 94-1344, at 2608 (1976).

[221] See 15 U.S.C. § 1314(b)(1).

[222] See 15 U.S.C. § 1314(b)(2).

[223] See 15 U.S.C. §§ 1312(d), 1312(e).

[224] See 15 U.S.C. § 1314(b). A petition to enforce a CID is a miscellaneous proceeding that enjoys no special immunity from the delays inherent in federal court litigation. See, e.g., United States v. Time Warner, Inc., Misc. No. 94-338 (HHG) (D.D.C. filed Nov. 3, 1994) (involving delay of two years before a decision was reached). Division attorneys facing a court proceeding to enforce a CID should seek the advice of the local U.S. Attorney's office as to the most expeditious procedure to use in that District. For example, in one matter a motion for an order to show cause was filed; in another matter, the petition was accompanied by a motion requesting expedited consideration.

A CID recipient involved in a proceeding to enforce, modify, or quash a CID may, in certain circumstances, be permitted limited discovery under the Federal Rules of Civil Procedure. However, such discovery is not a matter of right.[225] Recipients must make a substantial and supported showing that enforcement of the CID would work an abuse of the court's process.[226] The cases generally have held that discovery against the government in CID court proceedings must be used sparingly, to avoid destroying the usefulness of the CID process by delaying compliance.

Courts ordered discovery against the Division in In Petition of The Cleveland Trust Co.,[227] and in Associated Container Transportation (Australia) Ltd. v. United States.[228] The court in Cleveland Trust held that the right to discovery afforded by the Federal Rules of Civil Procedure was available to a CID recipient under the Act where improper motives in issuing the CID were alleged. The court permitted limited interrogatories to the Division seeking the identity of the persons who worked on the preparation of the CID and who participated in the decision to issue the demand. The AAG had filed an affidavit, but it did not address the improper motives issue.

In Associated Container, the court concluded that reasonable discovery was available in CID proceedings but that a court, in passing on the discovery, should bear in mind that the purpose of the

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[225] See United States v. Seitz, No. MS2-93-063, 1993 WL 501817, at *2 (S.D. Ohio Aug. 26, 1993), aff'd, 53 F.3d 332 (6th Cir. 1995).

[226] See United States v. Witmer, 835 F. Supp. 201 (M.D. Pa. 1993). Both Seitz and Witmer concerned CIDs issued under the False Claims Act, but the courts interpreted the legislative history of the 1976 amendments to the CID statute to reach their conclusions. The False Claims Act discovery provision, although not identical to, closely parallels the antitrust CID provision and the False Claims Act was modeled after the ACPA. See Witmer, 835 F. Supp. at 205 (stating that Congress "intended the legislative history and case law interpreting the Antitrust CID provision to 'fully apply' to the False Claims Act CID provision") (citing S. Rep. No. 99-345, at 33 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5298). The Witmer court also relied on Australia/Eastern U.S.A Shipping Conference v. United States, 1982-1 Trade Cas. (CCH) ¶ 64,721 (D.D.C. 1981), modified, 537 F. Supp. 807 (D.D.C. 1982), vacated as moot, Nos. 82-1516, 82-1683 (D.C. Cir. Aug. 27, 1986) and Finnell v. United States Dep't of Justice, 535 F. Supp. 410, 415 (D. Kan. 1982) for its holding that a recipient must make a "substantial and supported showing" that the CID would work an abuse of the Court's process in order to be permitted limited discovery. Witmer, 835 F. Supp. at 207.

[227] 1972 Trade Cas. (CCH) ¶ 73,991 (N.D. Ohio 1969).

[228] 502 F. Supp. 505 (S.D.N.Y. 1980).

CID procedure -- to allow the Division to investigate antitrust violations without prematurely becoming involved in full-blown litigation -- would be defeated if extended discovery were permitted to delay unduly CID enforcement proceedings.[229] The court permitted the CID recipient to serve limited interrogatories on the Division to substantiate its claim that the conduct under investigation was exempt from the antitrust laws and the Division therefore had no jurisdiction to issue the CID.

Several courts have disagreed with this aspect of the Associated Container decision.[230] In Finnell, the court quashed a deposition notice to a Division attorney after concluding that discovery was not warranted in the matter; the court cited the concern that extended discovery would destroy the usefulness of CIDs.[231] In Australia/Eastern U.S.A Shipping Conference v. United States, the court noted that the law in the District of Columbia Circuit strictly limits discovery in such proceedings, but recognized that discovery may be available in some investigative subpoena enforcement proceedings. The court, however, quashed the interrogatories to the Division on the basis that they were overly broad.[232]

In Maccaferri Gabions, Inc. v. United States,[233] the court disagreed with the Associated Container holding that discovery was "available as a matter of right," and noted that the holding had not obtained widespread acceptance.[234] As noted above, see Section E.8.c., the Maccaferri court determined that the Antitrust Division's affidavits were not necessarily "conclusive" and examined each of the grounds upon which Maccaferri based its contention that an improper purpose existed.[235] After that examination the court found that discovery was not warranted because: (1) the affidavit of the AAG put to rest the

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[229] See id. at 510.

[230] See Witmer, 835 F. Supp. at 207 (noting that the language in Cleveland Trust and Associated Container was broader than the actual relief afforded). According to the Witmer court, the actual discovery allowed is consistent with the view that wholesale discovery in CID enforcement proceedings would, in fact, be inconsistent with the purposes and effectiveness of the CID statutory scheme. See id.

[231] See 535 F. Supp. at 410.

[232] 1981-1 Trade Cas. (CCH) ¶ 63,943 (D.D.C. 1981).

[233] 938 F. Supp. 311 (D. Md. 1995).

[234] See id., 938 F. Supp. at 316 (quoting Associated Container, 502 F. Supp. at 509).

[235] See id. at 316-17.

allegation that she was personally and unusually involved in the investigation; (2) even if the Division had already concluded, prior to issuing the CID, that Maccaferri was "guilty," such a conclusion did not indicate an improper purpose; and, (3) the AAG's affidavit conclusively refuted the allegation that political influence was a motivating factor in issuing the CID.[236]0. *Id.* at 318; *see also* In Petition of Emprise Corp., 344 F. Supp. 319 (W.D.N.Y. 1972) (service of the interrogatories to show improper motive disallowed on basis that the interrogatories served no purpose in light of a Division affidavit denying improper motives).[237]

i. Appellate Review and Remedy Provisions

Any final order entered by a district court upon a petition for enforcement or quashing of a CID is appealable under 28 U.S.C. § 1291. Contempt of court sanctions are authorized for disobedience to a court enforcing a CID.[238]

9. Return of CID Materials at End of Investigation

At the close of an investigation or of any case or proceeding arising out of an investigation, the custodian is required, upon written request of a person who produced documentary material under the CID, to return to that person any original documentary material that has not passed into the control of any court, grand jury, or agency. The custodian should ensure that the original documents

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[236] See id. at 318. The court noted that not one scintilla of evidence raised a reasonable suspicion that political influence caused the authorization of the CID.

See id.; see also Petition of Emprise Corp., 344 F. Supp. 319 (W.D.N.Y. 1972) (disallowing service of interrogatories to show improper motive on basis that the interrogatories served no purpose in light of a Division affidavit denying improper motives).

[238] See 15 U.S.C.§ 1314(e); see also Maccaferri Gabions v. United States, Civ. No. MJG-95-1270 (D. Md. Apr. 16, 1996) (holding firm in civil contempt for failure to comply with order enforcing CID, and imposing fine of $10,000 per day of continued noncompliance).

are returned intact and that any stickers and extraneous matter are removed from the materials to be returned. The Division is required to return only original documents. Where the Division has made copies or is furnished with copies of documentary material pursuant to 15 U.S.C. § 1313(b) and (c)(2), the copies do not have to be returned to the person who produced the documents. See Division Directive ATR 2710.1, "Procedures for Handling Division Documents." The person, whether or not a subject of the investigation, should be advised that it is closed. The Division may retain copies of CID materials for use in other matters. Although the Division takes the position that materials obtained pursuant to CID are exempt from disclosure under the Freedom of Information Act, if the documents to be returned or destroyed are subject to an open FOIA request, return or destruction will be delayed until the FOIA request is resolved.

The Division may suggest that the producing party agree to have its CID materials destroyed rather than returned. Destroying the documents rather than returning them is usually less costly and labor-intensive.

When the custodian delivers CID material to a Department attorney for use in connection with a court, grand jury, or federal administrative proceeding, the attorney assumes responsibility, upon the completion of the proceeding, for returning to the custodian any material that has not passed into the control of the court, grand jury, or agency.[239]

10. Criminal Penalties

It a criminal offense intentionally to withhold, misrepresent, conceal, destroy, alter, or falsify any documentary material, answers to written interrogatories or oral testimony that is the subject of a CID.[240] Where there is reason to believe

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[239] See 15 U.S.C. § 1313(d)(l).

[240] See 18 U.S.C. § 1505. The text of this statute is reproduced above. See supra Chapter II, Section B.2.

that a CID recipient has intentionally withheld documents or information or has in any other way attempted to evade, avoid or obstruct compliance with a CID, initiation of a grand jury investigation should be considered.

Authority to conduct an obstruction of justice investigation, including authority to investigate by grand jury, is obtained by following the standard procedures for requesting preliminary inquiry and grand jury authority. Under 28 C.F.R. § 0.179a, matters involving obstruction of justice are under the supervisory jurisdiction of the Division having responsibility for the case or matter in which the alleged obstruction occurred. However, the regulations provide that, in order to determine the appropriate supervisory jurisdiction, the Division should consult with the Criminal Division prior to the initiation of an obstruction of justice grand jury investigation or enforcement proceeding.

F. Conducting A Grand Jury Investigation

The Antitrust Division Grand Jury Practice Manual, issued in November 1991, is a comprehensive statement of the Division's grand jury practices and procedures. Accordingly, this section contains only a brief introduction to the grand jury process for Division staff. It is not intended as a substitute for the more thorough discussion of grand jury issues contained in the Antitrust Division Grand Jury Practice Manual.[241] Many of the procedures set forth below vary by judicial district. When unfamiliar with local practice, staff should consult with the appropriate field office or U.S. Attorney's Office. Before a staff initiates a grand jury investigation, or consults with a U.S. Attorney's Office about the initiation of a grand jury investigation, in a judicial district in the territory of another field office, the attorney should notify the Chief of that office.

1. Requesting a Grand Jury Investigation

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[241] The Criminal Division's manual entitled Federal Grand Jury Practice is another valuable source of information regarding federal grand jury practice. In its appendix, the manual contains exemplars of various forms.

Consistent with the standards developed in Section C.5 of this Chapter on whether to proceed by criminal or civil investigation, the assigned staff should consider carefully the likelihood that, if a grand jury investigation developed evidence confirming the alleged anticompetitive conduct, the Division would proceed with a criminal prosecution. In requesting a grand jury investigation, staff attorneys should prepare a memorandum on behalf of the section or field office Chief to the Director of Criminal Enforcement detailing the information forming the basis of their request. That information may be based on the results of a preliminary inquiry or a CID investigation, but often information received from a complainant provides a sufficient basis for the request without conducting a preliminary inquiry. The request for grand jury authority should, to the extent possible, (a) identify the companies, individuals, industry, and commodity or service involved; (b) estimate the amount of commerce involved on an annual basis; (c) identify the geographic area affected and the judicial district in which the investigation will be conducted; (d) describe the suspected violations, including non-antitrust violations, and summarize the supporting evidence; (e) evaluate the significance of the possible violation from an antitrust enforcement standpoint (see supra Section B.1); (f) explain any unusual issues or potential difficulties the staff has identified; (g) identify the attorneys who will be assigned to the investigation; (h) explain the initial steps in the staff's proposed investigative plan; and (i) estimate the duration of the investigation.[242]

Staff should forward the grand jury request memorandum to the section or field office Chief for review. If approved by the Chief, the grand jury request memorandum should be e-mailed to the "CRIM-ENF" mailbox and "cc-ed" to the appropriate Special Assistant. An appropriate AMIS form ("New Matter Form" (ATR 141) if a preliminary inquiry was not authorized or "New Phase Form" (ATR 142) if a preliminary inquiry was conducted)[243] should be e-mailed to the Premerger

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[242] A "Request for Grand Jury Authority" macro should be used as the cover page for grand jury requests.

[243] See Division Directive ATR 2810.1, "AMIS."

Notification Unit/FTC Liaison Office by sending it to the AMIS mailbox. The assigned Special Assistant will prepare a memorandum for the Director of Criminal Enforcement, who will make his or her recommendation to the Assistant Attorney General. If approved by the Assistant Attorney General, letters of authority are issued for all attorneys who will take part in the grand jury investigation.[244]

The investigation must be conducted by a grand jury in a judicial district in which the violation occurred or in which subjects of the investigation are located or do business. In determining the district in which to conduct the grand jury investigation, staff should consider: (1) the degree of nexus between the location and the conduct under investigation; (2) convenience for staff and potential witnesses, including the production and review of documents; (3) availability of grand jury time (including the availability of antitrust-only versus "shared" grand juries, the frequency of meetings, and the duration of the grand juries' terms); (4) potential difficulties in conducting grand juries in particular jurisdictions; and (5) the judicial district(s) in which any resulting prosecution likely would be brought.

When seeking grand jury authority, staff should begin planning the investigation in much the same manner as described above. See supra Section C.1 (Conducting the Preliminary Inquiry). Staff should establish an investigative plan which should be modified frequently as the investigation progresses. Staff should identify in its plan:

1. subjects of the investigation;

2. factual issues relevant to determining guilt, the validity of potential defenses, or the economic impact of the violation (for both trial and sentencing purposes);

3. potential fact witnesses, whether they should be subpoenaed or interviewed, and whether they are candidates for immunity;

4. types of documentary evidence that may be relevant to factual issues;

5. potential sources of documentary evidence, and whether to obtain such evidence voluntarily, by subpoena, or by search warrant; and

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[244] Staff should determine whether the District where the grand jury will sit requires the filing of letters of authority. If so, they should be filed under seal. If not, they should be maintained in the section or field office files. If attorneys are added to the original staff, the Chief should notify the office of the Director of Criminal Enforcement and request additional letters of authority.

6. opportunities for covert investigation, such as consensual monitoring or the use of search warrants.

When appropriate, staff should give strong consideration to seeking the assistance of appropriate government agents and utilizing them as members of the staff.

2. Empaneling and Scheduling the Grand Jury

Among the first decisions staff must make after authority is granted is whether to request impanelment of a new grand jury or to use an existing one. Staff should attempt to estimate the number of sessions and the amount of time necessary to complete the investigation. When the investigation will likely take a considerable number of sessions and a substantial amount of grand jury time, it is best to begin a new 18-month grand jury[245] that will be empaneled specifically for antitrust investigations.[246] In that way, the Division can maintain better control over the scheduling of grand jury time and operate more efficiently. In some districts, the court is unlikely to empanel a new grand jury for the exclusive use of the Antitrust Division, and staff will share a grand jury with the U.S. Attorney's office. In such districts, staff usually should attempt to use the most recently empaneled grand jury, i.e., the grand jury with the greatest time left in its term. Staff generally should not seek to empanel a new grand jury when the Antitrust Division will be unable to utilize a significant portion of its available time. Underutilized grand juries may strain relations with the U.S. Attorney and court personnel.

Grand jury procedures can vary significantly in different jurisdictions. Staff should follow the procedures that have been established in the district in which the grand jury will sit. When an investigation will be conducted in an unfamiliar district, staff should consult the designated U.S. Attorney liaison to discuss local practice and, if sharing a grand jury, to discuss potential scheduling conflicts. Each field office has liaison with U.S. Attorney's Offices in its district. The field office can direct the staff to the proper liaison. Staff should develop a good working relationship with the local U.S. Attorney's Office whenever an investigation will be conducted outside a district in which a field office is located. Staff should inform the U.S. Attorney's Office, typically through its liaison, that the Division will be conducting the investigation. The U.S. Attorney liaison can assist in empaneling or scheduling the grand

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[245] Rule 6(g) of the Federal Rules of Criminal Procedure permits the court to extend the term of the grand jury up to an additional six months.

[246] When empaneling the grand jury, staff should consult the procedures and policies set forth in Chapter I in the Antitrust Division Grand Jury Practice Manual.

jury, familiarize staff with local procedures, and provide other advice and assistance. In some jurisdictions, staff will schedule the grand jury through the Clerk of the Court. In those jurisdictions, staff should develop a working relationship with the Clerk's Office.

3. Impounding Orders and Rule 6(e)(3)(B) Notices

In virtually every case, it will be necessary for Division attorneys to remove documents from the grand jury room and take them back to their offices for study and review. An impounding order may be required when documents will be taken out of the jurisdiction in which the grand jury sits or in certain other instances. When staff anticipates a need to remove documents from the jurisdiction, it should check local practice and determine whether it will be necessary to file an impounding order at the beginning of grand jury proceedings. Staff should also follow local practice when documents will not be removed from the jurisdiction. See Antitrust Division Grand Jury Practice Manual, Chapter IV(E)(1).

Rule 6(e)(3)(B) of the Federal Rules of Criminal Procedure requires the attorneys for the Government to provide the court with the names of people other than government attorneys to whom grand jury materials have been disclosed (e.g., economists, agents) and to certify that the attorneys have advised such persons of their obligation of secrecy.[247] Staff should consult with the local U.S. Attorney's Office and follow local practice in preparing this information for the court.

4. Issuing Grand Jury Subpoenas

During the course of its proceedings, the grand jury will issue subpoenas duces tecum and subpoenas ad testificandum. Subpoenas duces tecum require the submission of documentary materials to the grand jury. Subpoenas ad testificandum require individuals to appear before the grand jury to testify. The grand jury may also subpoena individuals to provide various types of exemplars, such as handwriting samples. Subpoena recipients typically receive significant lead time to comply with subpoenas, but in exceptional circumstances when there is a risk of flight or destruction or fabrication of evidence, subpoenas may require speedy compliance, usually within one day. Such "forthwith" subpoenas should be used rarely, and will likely be subject to close judicial scrutiny. See United States

[247] Secretaries, paralegals, and clerical staffs need not be listed as they may be considered the alter egos of the attorneys, economists, agents and others whom they assist. See Antitrust Division Grand Jury Practice Manual, at II-30.

Attorney's Manual § 9-11.140. Subpoenas are discussed at length in the Antitrust Division Grand Jury Practice Manual.

a. Subpoenas Duces Tecum

Subpoenas duces tecum often are issued to collective entities, such as corporations and partnerships, for which the Fifth Amendment privilege against self incrimination is not available. Thus, a custodian of documents for a collective entity cannot refuse to comply with a subpoena for records of that entity because the act of production might incriminate him. However, the government cannot introduce into evidence the fact that a particular person complied with the subpoena for records of the collective entity. Braswell v. United States, 487 U.S. 99, 118 (1988). Subpoenas duces tecum for documents may also be issued to individuals or sole proprietors, who are treated as individuals. Although the contents of a voluntarily created, pre-existing document are not protected by the Fifth Amendment privilege, In re Grand Jury Subpoena Duces Tecum, 1 F.2d 87, 93 (2d Cir. 1993), an individual's act of producing such documents may be self-incriminating by implicitly conceding the existence of the documents, the individual's possession of the documents, or the authenticity of the documents. Before issuing a subpoena duces tecum to an individual, staff should consider whether the individual's act of producing the subpoenaed documents may have such testimonial significance, and whether alternative methods of proof are available.[248] The power of the grand jury to issue subpoenas duces tecum is described in Chapter III(A) of the Antitrust Division Grand Jury Practice Manual.

Efforts to obtain evidence located outside the United States present difficult special considerations. Staff should consult with the Foreign Commerce Section to discuss possible methods of obtaining such evidence, including alternatives to subpoenas.[249]

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[248] Staff may consider requesting authority to compel individuals to produce documents through an immunity order limited to the act of production. In such cases, staff should examine the individual to the extent necessary to establish compliance with the subpoena, but care should be taken to limit inquiries solely to matters relevant to the act of production. See United States Attorney's Manual § 9-23.215.

[249] Special requirements regarding notification of foreign governments are discussed below. See infra Section F.11.d. It is prudent to notify Foreign Commerce any time an investigation involves a foreign witness, subject or target, foreign commerce, activity occurring outside the United States, or evidence located outside the United States. The policies and procedures for notifying foreign governments are constantly evolving. Close contact with Foreign Commerce will help avoid any oversights.

The schedule of documents to be attached to a subpoena duces tecum should include those documents necessary to a full investigation of the conduct in question. Such schedules should be based on the techniques described in Chapter III(D) of the Antitrust Division Grand Jury Practice Manual. Before being served, the subpoena schedule must be reviewed to ensure its completeness and to guard against burdensomeness or other grounds for possible motions to quash.[250]

Staff should determine how the subpoena will be served, usually by U.S. Marshal or by agent. Staff and counsel may also agree to voluntary acceptance of service by counsel on behalf of the recipient. Use of the Marshal Service can result in lengthy delays in service, especially in large metropolitan areas. Usually, staff will arrange for service of subpoenas, but in some jurisdictions the U.S. Attorney's Office may control the process.

The subpoena return date should provide a sufficient period of time for service of the subpoena and a document search and production. The subpoena return date must be a day when the grand jury will be sitting within the district. Staff, on behalf of the grand jury, may permit the recipient to return documents directly to the section or field office, rather than producing them before the assembled grand jury. Before permitting this option, staff should consider the benefit of requiring the document custodian to testify before the grand jury. Such testimony can provide important information regarding the scope of the search and production, and may result in the identification of documents withheld on a questionable assertion of privilege.

Once the subpoena is issued, counsel for the recipient frequently will claim the subpoena is overly burdensome and request its modification, sometimes threatening a motion to quash. Because schedules typically are drafted without knowledge of what documents exist and the form in which they are kept, staff should consider requests for modifications. Staff may agree, for example, to accept representative samples, defer production of specific types of documents, or otherwise modify the schedule if the recipient presents a convincing argument for doing so. Modifications should be denied if they are likely to affect the success of the investigation. If a reasonable accommodation cannot be reached, it is the policy and practice of the Antitrust Division to defend its subpoenas vigorously against motions to

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[250] As described below, see infra Section F.9, the Division has a "Corporate Leniency" policy regarding the possible grant of amnesty to corporate violators. Attaching to corporate subpoenas a notice informing the recipient of the Division's program may lead to increased awareness of the program. It is not mandatory to attach a "Corporate Leniency" policy to subpoenas served on subjects. If, however, staff wishes to do so, for consistent treatment the policy statement should be attached to subpoenas served on each corporate subject in the investigation.

quash.[251]

Prior to engaging in negotiations, staff should ensure that counsel has reviewed the schedule thoroughly with the recipient and understands the recipient's ability to comply with each demand. In most cases, negotiations will result in a satisfactory resolution. Every modification must be reduced to writing. Failure to do so may seriously compromise staff's ability to preserve the integrity of the subpoena and will make more difficult any subsequent attempt to pursue an obstruction case for withheld or destroyed documents. If litigation is necessary, staff should move to file all papers under seal and conduct the proceedings in chambers to prevent any breach of grand jury secrecy.

It is common to subpoena records from telephone companies and financial institutions.[252] Telephone companies need not notify a subscriber whose records are subpoenaed. To prevent premature disclosure that an investigation exists, staff should include with the subpoena a certification that the subpoena has been issued in connection with a criminal investigation, requesting that the existence of the subpoena not be disclosed to the customer. Under certain circumstances, staff may obtain a court order preventing disclosure. Subpoenas to financial institutions seeking individual account information are governed by the Right to Financial Privacy Act, 12 U.S.C. § 3401. The Act requires that all such subpoenaed records be returned and actually presented to the grand jury, and provides for reimbursement to the institution for the costs incurred in responding to the subpoena. Banks typically will comply with a letter requesting non-disclosure of the subpoena for a set period of time, which may be extended by a subsequent letter. Staff may obtain a court order prohibiting disclosure of the subpoena under certain circumstances.

b. Subpoenas Ad Testificandum

Testimony before the grand jury should be scheduled to utilize the grand jury efficiently. When issuing subpoenas ad testificandum, staff should attempt to schedule sufficient witnesses for a full session and should provide adequate lead time to minimize last minute cancellations. Subpoenas usually will be served by a U.S. Marshal or an agent, or may be accepted voluntarily by counsel on behalf of the recipient. Service by agent may provide an opportunity to interview the witness prior to the witness'

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[251] Various bases for attacking grand jury subpoenas duces tecum are described in Chapter III(F) of the Antitrust Division Grand Jury Practice Manual.

[252] As competition begins to develop for different types of telephone service, identifying the proper subpoena recipient is becoming an additional, sometimes complex step.

grand jury appearance, and often is quicker than service by U.S. Marshal.

The subpoena ad testificandum should include the following attached statement of the witness' rights and obligations in appearing before the grand jury, unless circumstances render such advice clearly superfluous[253] (see United States Attorney's Manual § 9-11.150):

Advice of Rights

1. The Grand Jury is conducting an investigation of possible violations of federal criminal laws involving antitrust offenses under the Sherman Act, 15 U.S.C. §§ 1 and 2.

   (State here the general subject matter of the inquiry, e.g., conspiring to fix prices of widgets in violation of 15 U.S.C. § 1)

2. You may refuse to answer any question if a truthful answer to the question would tend to incriminate you.

3. Anything that you do say may be used against you by the Grand Jury or in a subsequent legal proceeding.

4. If you have retained counsel, the Grand Jury will permit you a reasonable opportunity to step outside the grand jury room to consult with counsel if you so desire.

In addition to the notification given to an individual when subpoenaed, the witness should be made aware of the following at the time of the witness' appearance before the grand jury:

1. The identity of the government attorneys and the presence of the grand jurors and the court reporter.

2. The nature of the inquiry (e.g., possible price fixing for the sale of widgets).

3. The witness' status as a target, if that is the case.[254]

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[253] The subpoena should also have as an attachment the procedures a witness must follow to receive reimbursement for travel expenses and a witness fee. This is often handled by the section or field office Victim-Witness coordinator.

[254] Staffs should be aware of the Department's position on subpoenaing "subjects" or "targets" of an investigation, see United States Attorney's Manual §§ 9-11.150 to .163, as well as the

4. The witness' Fifth Amendment right to refuse to answer any question if a truthful answer would tend to incriminate him or her.

5. That anything the witness says may be used against the witness in any criminal proceeding.

6. That the witness will be afforded a reasonable opportunity to leave the room to consult with counsel.

7. That the grand jury proceedings are secret. While there are exceptions pursuant to statute, such as subsequent trials, no one other than the witness may disclose publicly what has occurred in the grand jury. The witness may disclose what has occurred in the grand jury to anyone if he or she wishes, but is not required to disclose such information to anyone.

8. If the witness has been immunized, that the witness understands the effect of the immunity order and that the witness' testimony could still be used in a prosecution for perjury or making a false statement to the grand jury.

The witness should be asked to acknowledge his or her understanding of each of the identified rights and obligations.

c. Subpoenas for Exemplars

In addition to issuing subpoenas for documents or testimony, the grand jury may issue subpoenas requiring individuals to provide various types of exemplars. Most typical in antitrust investigations are subpoenas to provide samples of handwriting for use in establishing authorship or authentication of documentary evidence. Prior to issuing the subpoena, staff must arrange with an investigative agent to take the exemplar. When the witness appears before the grand jury, the foreperson will inform the witness that a particular person has been designated the grand jury's agent to take the exemplar, and will direct the witness to provide the exemplar at a particular time and place. Usually, upon receipt of the subpoena, the recipient will agree to provide the exemplar at a mutually convenient time and place without appearing before the grand jury.

Department's position on requests by subjects and targets to testify before the grand jury, see id. § 9-11.152. See also infra Section F.7. (discussing standards for immunity).

5. Search Warrants

Search warrants may be applied for when there is probable cause to believe a crime has been committed, that documents or other items evidencing the crime exist, and that such items to be seized are at a particular location. The elements of probable cause are the same for an antitrust crime as for other crimes, both as a matter of law and Division policy. It is not necessary to have probable cause to believe that evidence of the crime may be destroyed or withheld if not seized by search warrant. Application for a search warrant is made through a magistrate who conducts a thorough review to establish that probable cause exists.

When there is already significant evidence of a crime, staff should consider using search warrants prior to or in addition to the issuance of subpoenas duces tecum. If probable cause does not exist at the beginning of an investigation, staff should consider the possibility of developing probable cause before issuing compulsory process, making voluntary requests, conducting interviews, or taking other steps that would make the investigation public.

Search warrants are the most effective means for gathering incriminating evidence. The use of search warrants as opposed to subpoenas duces tecum minimizes the opportunity for document destruction and concealment, and prevents the failure to produce responsive documents either deliberately or through inadvertence. During the course of an investigation, staff may learn that material documents responsive to a subpoena duces tecum have been withheld. If staff believes documents have been withheld (as distinguished from inadvertently overlooked), rather than provide the recipient a second chance to produce the documents in response to the original or a new subpoena, staff should consider applying for a search warrant. The requisite probable cause underlying the application may be based on the substantive crime under investigation or, if sufficient evidence exists, on obstruction of justice due to the withholding of subpoenaed materials.

When seeking a search warrant, staff must obtain the assistance of an investigative agency, usually the FBI. With guidance from a staff attorney, an agent will draft an affidavit, which states the grounds for seeking the warrant, and the original warrant for the magistrate to sign. The warrant must describe with particularity the property to be seized; state that the property is evidence of a specified criminal offense; provide an exact description of the location to be searched; note the period of time within which the search is to be executed;[255] and note whether the search will be conducted in the daytime or whether

[255] The period may be no greater than within ten days.

it may be executed at any time.[256] The affidavit must include sufficient facts to establish probable cause that the crime was committed and that evidence of the crime is at the search location. Supporting evidence must not be stale but there is no set time period after which staleness is presumed. The affidavit may be based entirely on hearsay, as long as the source of the evidence is reliable. The degree of specificity with which the warrant must describe the documents to be seized and the location to be searched may vary depending on the circumstances. When seeking business records, it is usually sufficient that the warrant describe records of a type usually maintained by the business at the business location.

The Director of Criminal Enforcement must approve any search warrant application. Staff should prepare a memorandum from the field office or section Chief detailing the need for the search warrant, to be sent to the Director of Criminal Enforcement with copies (not originals) of the affidavit and warrant.

The application will be made to a magistrate in the judicial district where the property is located. The affidavit should be filed under seal. Staff should consult with the local U.S. Attorney's Office concerning local custom and procedures, including whether the affidavit is automatically filed under seal, or if a motion to file under seal must be made at the time of application.

Once approved, the search is conducted by a team of agents, who may also seek to interview individuals on site. No staff attorney should be present during the search, but an attorney should be available by telephone for consultation with the agents.[257] Upon the conclusion of the search, the agents should serve a subpoena duces tecum requiring the production of documents covered by the search warrant and any additional documents needed by the grand jury.[258]

If staff believes that privileged documents may have been seized during the search, or if counsel for the subject claims that to be the case, procedures should be followed to ensure that staff and the

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[256] The Division will rarely seek permission to conduct a nighttime search, which must be based on a showing of cause.

[257] A more detailed discussion of search warrants is contained in Chapter III(I) in the Antitrust Division Grand Jury Practice Manual.

[258] A subpoena duces tecum should include documents subject to the search warrant to obtain documents maintained at other locations or that were missed at the search location.

case agent are not tainted by reading privileged documents.

6. Checklist of Procedures for a Grand Jury Session

These are suggested procedures for the preparation and conduct of a grand jury session. As indicated above, the Division generally follows the procedures used by the U.S. Attorney in a given district. Staff should consult with the local U.S. Attorney's liaison when unfamiliar with local practice. This checklist suggests a series of practical matters that should be kept in mind in planning the grand jury sessions.

a. Procedures for setting up the session:

i. Inform the Clerk's Office or U.S. Attorney of the timing of the session at least one month in advance of the session, so that room arrangements may be made and the jurors may be notified of the schedule. If the Division is sharing a grand jury with the U.S. Attorney's Office or another section or field office, arrangements should be made as early as practicable to ensure availability of grand jury time. Staffs should be aware that in some districts, staff is responsible for notifying the grand jurors of a scheduled session; in other districts, the U.S. Attorney's office or the Clerk will issue the notices.

ii. Arrange to obtain a court reporter at the time the session is scheduled and the jurors notified. See Division Directive ATR 2570.1, "Payment of Litigation-Related Expenses." In some jurisdictions, arrangements will be made by the local U.S. Attorney's Office.

iii. If subpoena service will be made by the U.S. Marshal, send subpoenas to the U.S. Marshal in the relevant district with a cover letter indicating the date of the testimony, the date by which service is required and other relevant information. Since Marshals in large metropolitan areas have a number of duties and may take as long as two weeks to serve subpoenas (and occasionally longer), staff should provide as much lead time as possible for service. Often counsel for a prospective witness will insist the witness be immunized. When staff anticipate compelling a witness' testimony, they must allow sufficient time after service to negotiate with counsel and receive a proffer of the witness' testimony, if appropriate.

Except when few documents are sought, compliance with subpoenas duces tecum requires more lead time than testimonial subpoenas. The subpoena return date should be selected to allow sufficient time after service for document search and retrieval. The time needed for

compliance, however, is often subject to negotiation and may be extended if necessary.

iv. Prepare immunity clearance requests for witnesses who may claim their Fifth Amendment privileges at the session. The immunity clearance papers (see infra Section F.7) must be received by the office of the Deputy Assistant Attorney General for criminal enforcement at least two weeks before the date on which staff will need the clearance and possession of the immunity authorization letter. The date that staff needs the letter is the date that the U.S. Attorney will review the motion papers, or the date the judge will be asked to sign the order.

b. Immediately before the session begins determine whether the stenographer has been sworn before the grand jury. If not, check that a copy of the stenographer's oath is available to be administered by the foreperson prior to the recordation of any statement or testimony.

7. Requests For Statutory Immunity

The Organized Crime Control Act of 1970 established the present statutory basis for granting use immunity to witnesses before a grand jury, at trial, and in other judicial proceedings. See 18 U.S.C. § 6001, et seq. All requests for statutory immunity must be reviewed by the Deputy Assistant Attorney General for criminal enforcement and cleared by the Criminal Division.

a. Division Procedures for Processing Requests for Statutory Immunity

For each witness for whom staff seeks immunity, staff should prepare: (1) an original and one copy of Form OBD-111 and (2) a letter from the Deputy Assistant Attorney General, Antitrust Division, to the U.S. Attorney in the appropriate district, requesting that the U.S. Attorney apply to the Court for an immunity order.[259] The text of the letter from the Deputy Assistant Attorney General to the U.S. Attorney is as follows:

Dear _____:

Pursuant to the authority vested in me by 18 U.S.C. § 6003(b) and 28 C.F.R. 0.175(b), you are authorized

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[259] Although courts may permit one letter identifying multiple witnesses for whom immunity is sought, staff should prepare one letter per witness to avoid any potential difficulties.

to apply to the United States District Court for the District of _____ for an order pursuant to 18 U.S.C. §§ 6002-6003 requiring [name of witness] to give testimony or provide other information in the above matter and in any further proceedings resulting therefrom or ancillary thereto.

Sincerely,

Deputy Assistant Attorney General

The forms and letters are submitted to the office of the Deputy Assistant Attorney General for criminal enforcement with a memorandum prepared by staff for the section or field office Chief stating the status of the investigation and detailing the reasons staff seek immunity for each witness. This memorandum should include, for each witness, the following information: (a) the witness' current position and positions held during the period under investigation; (b) the witness' likely role and degree of culpability in the matter under investigation; (c) identification of the witness' superiors and subordinates, if relevant, and the substance of any testimony each has given; (d) the substance of any proffer the witness or counsel has given, or if none has been given, whether a proffer is expected; (e) how and why staff believes the witness can further the investigation; (f) any additional reasons why the witness should be immunized, such as age, health, personal problems, or equity considerations; and (g) a full description of who is left for prosecution and an assessment of the likelihood of obtaining indictable evidence against such person(s).

When requesting immunity authorization for individuals with significant pricing responsibility, keep in mind that the Division's charging policy is to prosecute the highest ranking culpable individual from each organization against whom we are able to develop admissible evidence likely to result in a sustainable conviction. Therefore, immunity request memos for individuals with significant pricing responsibility should explain: which individuals remain available for indictment; the culpability of the individuals recommended for immunity relative to any remaining non-immunized individuals; the incriminating evidence we currently have against that (those) remaining non-immunized individual(s); and the likelihood of developing a prosecutable case against him/her (them). In addition, the memo should discuss the potential impact on the prosecution if evidence against the remaining non-immunized higher-ups is not developed. For example, staff should candidly state if, based on their best assessment of the current evidence and evidence likely to be developed, the requested immunity would likely result in a case only against the immunized witness' company.

When staff proposes compelling the testimony of a potential individual target, the Deputy Assistant

Attorney General for criminal enforcement usually will require staff to obtain a witness or counsel proffer, and may require a report on the substance of the proffer prior to granting approval. This procedure ensures consistency in the treatment of witnesses in various investigations.

Requests for statutory immunity must be received by the office of the Deputy Assistant Attorney General for criminal enforcement at least two weeks before the date that staff will need the immunity authorization letter in its possession.[260] The Antitrust Division must clear all immunity requests through the Witness Records Unit of the Criminal Division. See United States Attorney's Manual § 9-23.120. The Criminal Division requires 10 working days (exclusive of holidays) to conduct a search of the Department's files, for which it requires each witness' full name, address, social security number, and date of birth. In addition to the time required for obtaining immunity clearance, staff must allow sufficient additional time to obtain the U.S. Attorney's signature on the immunity motion. If more than six months have elapsed since the witness was previously immunized or authorized for immunity, staff should contact the office of the Deputy Assistant Attorney General for criminal enforcement to determine whether the witness must be recleared by the Criminal Division.

When sending OBD-111 forms forward, staff must also send informational copies to the U.S. Attorney to provide the U.S. Attorney an opportunity to make an independent determination that an immunity order is in the public interest. See United States Attorney's Manual § 9-23.110. Prior to seeking the order to compel, staff must obtain the U.S. Attorney's signature on the petition. Depending on the jurisdiction and the judge to whom the matter is assigned, the court may require a hearing on the petition at which the witness must appear, or may simply sign the petition without a hearing.

b. Division Standards for Seeking Immunity Authorization

The following factors are among those to be considered in determining whether it is in the public interest to compel the testimony of a person for whom staff have requested immunity (see United States Attorney's Manual § 9-23.130):

a. The importance of the investigation to effective enforcement of the criminal antitrust laws;

b. The quality of the person's testimony or information;

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[260] In exceptional circumstances, the procedure may be shortened. See United States Attorney's Manual § 9-23.101.

c. The likelihood that the person's testimony will enhance the prospect of successful prosecution against more culpable individuals;

d. The likelihood of prompt and full compliance by the witness, and the effectiveness of available sanctions if there is no such compliance;

e. The person's relative culpability in connection with the offense being investigated and the person's history with respect to criminal activity;

f. The possibility of successfully prosecuting the person prior to compelling the person to testify or produce information; and

g. The likelihood of adverse collateral consequences to the person if he testifies or provides information under a compulsion order.

Since it is the Division's charging policy to prosecute the highest ranking culpable individual from each organization against whom we are likely to develop an indictable case, the most significant considerations in reviewing an immunity authorization request will be the individual's degree of culpability and the anticipated value of the individual's expected testimony in advancing the investigation against more culpable individuals.

Staff ordinarily should avoid compelling the testimony of a witness who is a close family relative of a subject of the investigation. Compulsion usually is appropriate, however, when the witness and the relative participated in a common business enterprise and the testimony will relate to that business, or when the testimony will relate to illegal conduct in which there is reason to believe both the witness and the relative participated. See United States Attorney's Manual § 9-23.211.

The Division usually will not seek immunity authorization for an individual who is a potential target of the investigation unless that individual or counsel provides a full and candid statement of the individual's proposed testimony.

8. Informal Immunity[261]

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[261] The Antitrust Division Antitrust Division Grand Jury Practice Manual, Chapter V(I), has a comprehensive section on the treatment of informal immunity.

Judicious use of "letter" or "informal immunity" can enhance the effectiveness and efficiency of our investigations and avoid the unnecessary waste of grand jury time. Informal immunity is conferred by a letter from the Division setting forth the terms under which a witness's statements may or may not be used against that witness. Informal immunity may be used to conduct interviews with witnesses before or in lieu of a grand jury appearances. Also, witnesses appearing before the grand jury may accept informal immunity rather than going through the sometimes lengthy process of obtaining court ordered immunity, which in some districts requires an appearance before a judge.

The Division considers the bar against its use of immunized testimony against a witness obtained pursuant to informal immunity to be the practical equivalent of court ordered immunity. Since the practical restriction against Division use is the same, the standards for obtaining informal and court ordered immunity are the same; any notion of a "lower" standard for "lesser" immunity is incorrect. However, informal immunity is not the legal equivalent of statutory immunity. Thus, no letter conferring immunity should state or suggest that the immunity the letter provides is co-extensive with court ordered immunity under 18 U.S.C. § 6001 et seq. The Deputy Assistant Attorney General has circulated a model informal immunity letter that must be used when conveying informal immunity.[262] The protections

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[262] See Letter from Gary R. Spratling, Deputy Assistant Attorney General, Clarification of Division Policy on Informal Immunity and Model Letter, February 13, 1997. The model informal immunity letter reads as follows:

Re: [caption of investigation]

Dear [witness]:

The Antitrust Division is conducting an investigation of possible violations of the antitrust laws in the [XXXX] industry. Your counsel has advised us that you would decline to answer our questions [at an interview][before the grand jury] on the ground that your truthful answers may tend to incriminate you. Accordingly, this letter sets forth the conditions under which you will provide documents, objects, and/or statements in response to our questions [at an interview][before the grand jury] on [date].

We will ask questions about alleged violations of Section 1 of the Sherman Act, 15 U.S.C. § 1, and related federal statutes. Your responses to our questions will be complete, candid, and truthful.

The United States will not make direct or indirect use of the oral or written statements that you make in response to our inquiries, nor will we make direct or indirect use of any document or object that you make available to us in response to our inquiries, to prosecute you for any violation of Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1, or for violation of any other federal criminal statute committed in connection with [bid rigging] [price fixing] [market allocation] in the [blank] industry in [geographic area] between [date] and the date of this letter. However, our agreement not to make direct or indirect use of information you provide will not apply to any violation of the federal tax laws.

provided in the model letter are not the equivalent of court ordered statutory immunity, nor can they be. For example, statutory immunity is binding upon the states whereas informal immunity is not. The model informal immunity letter is limited to the Division's agreement not to make "direct or indirect use" of any statements, documents, or objects provided by the witness, and is binding upon the United States.

When preparing an immunity letter, staff must limit the scope of the no direct or indirect use provision by reference to specific statutes, industry, geographic area, and time period. With regard to the statutory limitations, the no use provision in the model letter is confined to prosecution of the witness for a violation of Section 1 of the Sherman Act or for a violation of "any other federal criminal statute" committed in connection with the anticompetitive scheme. If necessary, staff may substitute, in place of the letter's generic reference to federal criminal statutes, any or all of the following statutes as appropriate to the facts of the investigation: the mail or wire fraud statutes, 18 U.S.C. §§ 1341 and

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The United States may use your oral or written statements and the documents or objects you provide against you in the following circumstances:

a. as substantive evidence in prosecuting you for perjury (18 U.S.C. § 1621), for making a false statement (18 U.S.C. § 1001), for making a false statement under oath (18 U.S.C. § 1623), or for obstruction of justice (18 U.S.C. § 1501 et seq.);

b. to impeach your testimony in any proceeding, including any prosecution of you.

There are no other agreements between the United States and you regarding your prosecution or non-prosecution or the use of the statements, documents, or objects you provide in response to our inquiries.

The United States may use directly or indirectly any of the statements you make or the documents or objects you provide for, or in connection with, the prosecution of any other individual or artificial entity, such as a corporation.

Please sign and date this letter to indicate your understanding of and agreement with the conditions for your [interview][grand jury appearance] and ask your counsel to do the same.

Sincerely yours,

[Chief]
[Field Office]

_____ _____
[witness] DATE

_____ _____
Counsel for [witness] DATE

1343; the false statement statute, 18 U.S.C. § 1001; the federal conspiracy statute, 18 U.S.C. § 371; the false claims statutes, 18 U.S.C. §§ 286 and 287; or the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962. However, inserting a laundry list of statutes may create a false impression with a jury that the witness had exposure (and faced jail time) under each of the enumerated statutes.

The procedure for obtaining clearance to grant informal immunity varies depending upon whether the prospective witness had final pricing or bidding authority. Clearance for low-level employees may be sought on a category by category basis (e.g., secretaries, estimators) in a memorandum from the Chief to the Director of Criminal Enforcement. Staff should consider seeking clearance for low-level employees early in an investigation. If the potential witness has pricing authority, the procedure for obtaining authority to grant informal immunity is the same as for obtaining statutory immunity authority.

9. Corporate and Individual Leniency ("Amnesty")

On August 10, 1993, the Division modified its corporate leniency policy under which a corporation can avoid criminal prosecution, i.e., obtain "amnesty", by confessing its role in illegal activities, fully cooperating with the Division, and meeting other specified conditions. The conditions differ based on whether the corporation comes forward before or after an investigation has begun.[263] The corporate leniency policy also includes conditions under which corporate employees will be considered for individual leniency. On August 10, 1994, the Division also established a new leniency policy for individuals who approach the Division on their own behalf, not as part of a corporate proffer or confession. These leniency policies, also referred to as “amnesty” programs, are intended to reduce prosecutorial discretion and provide greater certainty to parties considering whether or not to come forward. Consequently, they require that leniency be granted if a party that comes forward meets the specified conditions.[264] The leniency program has proven effective in uncovering the existence of previously undetected violations and in increasing the efficient use of Division resources by quickly advancing investigations.

a. Criteria for Corporate Leniency

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[263] Prior policy precluded the grant of amnesty once an investigation had begun.

[264] If the criteria are met, amnesty must be granted even when just two companies participated in the conspiracy.

Only the first corporation to come forward with regard to a particular violation may be considered for leniency as to that violation.[265] If the company which first applies for leniency does not meet the qualifications and leniency is not granted, leniency remains available for any other company which qualifies. The conditions a company must meet to qualify for corporate leniency vary depending on when it comes forward. A company that comes forward before an investigation has begun will be assured of receiving leniency if it meets the following set of conditions.

(i) Leniency Before an Investigation Has Begun[266]

Staff should recommend, and leniency will be granted, to a corporation reporting illegal activity before an investigation has begun if the following six conditions are met:

1) At the time the corporation comes forward, the Division has not received information about the illegal activity being reported from any other source;

2) Upon discovery of the conduct, the corporation took prompt and effective action to terminate its participation in the illegal activity;

3) The corporation reports the wrongdoing with candor and completeness and provides full, continuing and complete cooperation to the Division throughout the investigation;

4) The confession of wrongdoing is truly a corporate act, as opposed to isolated confessions of individual executives or officials;

5) Where possible, the corporation makes restitution to injured parties; and

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[265] Any leniency request should be promptly reported to the Director of Criminal Enforcement and the Deputy Assistant Attorney General for criminal enforcement. Issues can arise concerning which corporation sought leniency first. Under the "only-the-first-in" rule, there have been dramatic differences in the disposition of the criminal liability of corporations whose respective approaches to the Division were very close in time. Some candidates may go directly to the Director of Criminal Enforcement or the Deputy Assistant Attorney General for criminal enforcement so prompt communication is essential.

[266] This is usually referred to as "Type A" amnesty.

6) The corporation did not coerce another party to participate in the illegal activity and clearly was not the leader in, or the originator of, the activity.

The major change in the 1993 Leniency policy provides that a company will qualify for leniency even after the Division is aware of the illegal activity if the following conditions are met:

(ii) Alternative Requirements for Leniency[267]

1) The corporation is the first to come forward and qualify for leniency with respect to the illegal activity being reported;

2) At the time the corporation comes in, the Division does not have evidence against the company that is likely to result in a sustainable conviction;

3) Upon discovery of the illegal activity being reported, the corporation took prompt and effective action to terminate its participation in the activity;

4) The corporation reports the wrongdoing with candor and completeness and provides full, continuing and complete cooperation that advances the Division in its investigation;

5) The confession of wrongdoing is truly a corporate act, as opposed to isolated confessions of individual executives or officials

6) Where possible, the corporation makes restitution to injured parties; and

7) The Division determines that granting leniency would not be unfair to others, considering the nature of the illegal activity, the confessing corporations's role in it, and when the corporation comes forward.

In applying condition seven, the primary considerations are how early the corporation has come forward and whether the corporation coerced another party to participate in the illegal activity or clearly was the leader in, or originator of, the activity. The burden of satisfying condition seven will be low if the corporation comes forward before the Division has begun an investigation into the illegal activity.

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[267] This is usually referred to as "Type B" amnesty.

That burden will increase the closer the Division comes to having evidence that is likely to result in a sustainable conviction.

(iii) Leniency for Corporate Directors, Officers, and Employees

If a corporation qualifies for leniency under the conditions set forth in Section F.9.a(i) (“Leniency Before an Investigation Has Begun” or "Type A" amnesty), all directors, officers, and employees of the corporation who admit their involvement in the illegal antitrust activity as part of the corporate confession will also receive amnesty from criminal prosecution if they admit their wrongdoing with candor and completeness and continue to assist the Division throughout the investigation. Individuals who come forward with a corporation receive amnesty if their corporations qualify for leniency under Section F.9.a(i) ("Type A" amnesty); if their corporation only qualifies for leniency under Section F.9.a(ii) ("Type B" amnesty) or do not qualify for leniency at all, such individuals cannot qualify for leniency but may still qualify for statutory or informal immunity under the standards discussed in Sections F.7 and F.8.

b. Criteria for Individual Leniency

An individual who approaches the Division on his or her own behalf to report illegal antitrust activity may qualify for amnesty under the Individual Leniency Policy. The individual must approach the Division before it has become aware of the illegal activity, and must not have approached the Division previously as part of a corporate approach seeking amnesty for the same illegal conduct.[268] Staff should recommend and leniency will be granted to an individual reporting illegal antitrust activity before an investigation has begun, if the following three conditions are met:

1) At the time the individual comes forward to report the illegal activity, the Division has not received information about the illegal activity being reported from any other source;

2) The individual reports the wrongdoing with candor and completeness and provides full, continuing and complete cooperation to the Division throughout the investigation; and

[268] Once a corporation attempts to qualify for leniency under the Corporate Leniency Policy, any individuals who come forward and confess with the corporation will be considered for leniency solely under the provisions of the Corporate Leniency Policy. They may not be considered for leniency under the Individual Leniency Policy.

3) The individual did not coerce another party to participate in the illegal activity and clearly was not the leader in, or the originator of, the activity.

Any individual who does not qualify for leniency under the Corporate or Individual Leniency Policies may still be considered for statutory or informal immunity from criminal prosecution, based on the criteria set forth above. See supra Sections F.7, F.8.

c. Procedure for Conferring Leniency

When staff receives a request for corporate or individual leniency and believes the individual or corporation satisfies the necessary conditions, they should forward a favorable recommendation from the section or field office Chief to the Deputy Assistant Attorney General for criminal enforcement, through the Director of Criminal Enforcement, setting forth the reasons why leniency should be granted. Staff should also include a copy of the proposed leniency agreement.[269] Staff should make their recommendation immediately, and not wait until a fact memo recommending prosecution of others is prepared. The Deputy Assistant Attorney General will review the request and forward it to the Assistant Attorney General for final decision. If staff recommends against leniency, corporate counsel or the individual or individual's counsel may seek an appointment with the Deputy Assistant Attorney General to discuss the leniency request. Although individuals and counsel are not entitled to such a meeting, the opportunity generally will be afforded. Applications for amnesty are confidential and should not be discussed with anyone not involved in the case or in processing the application.

Staff should exercise caution before recommending or granting leniency to any individual or corporation. Staff should take steps to learn if adverse information exists concerning the individual or corporation, including its officers, to minimize the possibility such information will surface after leniency has been granted.

10. Requesting Internal Revenue Service Information During a Grand Jury Investigation

When Division attorneys require information from the IRS, they must comply with the procedures

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[269] The materials should be e-mailed to the CRIM-ENF mailbox. As indicated earlier, staff should notify the Deputy Assistant Attorney General for criminal enforcement and the Director of Criminal Enforcement as soon as they begin leniency discussions with a corporation or individual so there is a clear record of who first approached the Division.

set forth in 26 U.S.C. § 6103.[270] Tax information retained by a source other than the IRS is not subject to § 6103 and may be obtained by subpoena.

Section 6103 classifies information into three general categories: returns, taxpayer return information, and return information other than taxpayer return information. Returns and taxpayer return information consist generally of the returns themselves and any supporting or related information furnished by the taxpayer or by someone on the taxpayer's behalf. A court order is required before the IRS may disclose such information to Division personnel in connection with non-tax matters. Return information other than taxpayer return information is information gathered by the IRS from third parties. The IRS may disclose such information to Division personnel upon written request by the Assistant Attorney General to the Commissioner of the IRS.

The procedures to be followed in obtaining information from the IRS are set out at United States Attorney's Manual § 9-13.900 et seq. All requests for such information must be processed through the Director of Criminal Enforcement and approved by the Assistant Attorney General. Sample forms and pleadings are available at the end of United States Attorney's Manual § 9-13.

11. Notification or Approval Procedures in Certain Types of Investigations

In certain circumstances, investigations or investigative steps may be subject to additional reporting or approval requirements. Additional requirements exist in the following circumstances: (1) a public figure or entity is the subject of an investigation, (2) staffs intend to subpoena or indict a member of the news media or news media organization, (3) staff intends to subpoena an attorney concerning his or her representation of a client, or (4) a foreign government or foreign national is the subject of an investigation or will be issued a subpoena.

a. Notice of Subjects of Sensitive Criminal Investigations

As set forth in Division Directive ATR 3300.1**,** "Notification of Sensitive Criminal Investigations," it is the policy and practice of the Department of Justice to keep appropriate Department officials, including the Assistant Attorney General of the Criminal Division, the Associate Attorney General, the

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[270] If staff is working with the IRS in a joint investigation of tax and antitrust offenses, as discussed below, see infra Section F.12.a, tax returns may be obtained directly from the IRS by the tax agent assigned to the investigation.

Deputy Attorney General and the Attorney General, advised of sensitive criminal investigations, particularly those where public officials or entities are the subjects of the investigation. The notification function is for information purposes only, and is not intended to interrupt, delay or otherwise affect the normal conduct of the investigation. No special authorization for the investigation is required.

Staff should orally notify the Deputy Assistant Attorney General for criminal enforcement whenever it determines that the grand jury investigation is a sensitive investigation as described at United States Attorney's Manual § 9-2.155. Staff should then prepare a memorandum from the Assistant Attorney General, Antitrust Division, to the Assistant Attorney General, Criminal Division, naming the subject and briefly describing the investigation, including its current status and the subject's role in the matter.

The memorandum should be sent to the Deputy Assistant Attorney General for criminal enforcement, through the Director of Criminal Enforcement, by e-mailing it to the CRIM-ENF mailbox. The memo will be reviewed and then forwarded to the Assistant Attorney General, Antitrust Division, for approval. If approved, the memorandum is sent to the Assistant Attorney General, Criminal Division, who is responsible for notifying the appropriate Department officials of the investigation and providing them with copies of the memorandum.

b. Approval of Subpoenas to and Indictment of Members of the News Media and News Organizations

Staff may not indict nor issue a subpoena regarding news gathering functions to members of the news media or news organizations, including industry or trade publications, without the express approval of the Attorney General.[271] Whenever an investigation requires information available from the news media, staff first should attempt to obtain the necessary information from non-media sources. If such attempts are unsuccessful and news media sources are the only reasonable sources of the information, staff should attempt to negotiate voluntary provision of the information. If negotiations fail, staff must obtain the approval of the Attorney General to issue subpoenas based on the standards set forth at 28 C.F.R. § 50.10. See also United States Attorney's Manual § 9-2.161. If uncertain whether these provision are applicable to particular circumstances, staff should consult with the Director of Criminal

[271] This requirement applies only to subpoenas regarding news gathering functions and does not apply to subpoenas seeking only business records. As to the latter, however, Division policy requires a determination by the Assistant Attorney General that the information sought relates solely to commercial or financial information before a subpoena may be issued.

Enforcement.

To obtain the Attorney General's approval, staff should provide a memorandum to the Deputy Assistant Attorney General for criminal enforcement, through the Director of Criminal Enforcement, explaining the circumstances justifying the subpoena request or proposed indictment. Staff should also provide a memorandum from the Assistant Attorney General, Antitrust Division, to the Attorney General setting forth the factual situation and the reasons for the request, in accordance with the principles in 28 C.F.R. § 50.10.

During the time the Assistant Attorney General and the Attorney General are reviewing the request, the staff should take no steps to begin the process of subpoenaing or otherwise interrogating any member of the news media. Staff should allow substantial review time for its request.

This procedure provides the most effective means to maintain a consistent policy of fairness in balancing two important concerns, the importance of a free press and the need for specific information to uncover violations of the law.

c. Issuance of Subpoenas to Attorneys For Information Relating to the Representation of Clients

Because of its potential adverse effect upon an attorney-client relationship, staff in all litigating divisions must obtain the authorization of their respective Assistant Attorney General before issuing a subpoena to an attorney for information relating to the representation of a client. Before seeking authorization to issue a subpoena, staff should attempt to obtain information from alternative sources or voluntarily from the attorney, unless such efforts may compromise the investigation. The following conditions must be met before the Assistant Attorney General will approve the issuance of a subpoena:

a. the information is reasonably necessary to investigate or prosecute a crime that is being or has been committed by any person;

b. all reasonable attempts to secure the information from alternative sources have failed;

c. the need for the information outweighs the adverse impact on the attorney-client relationship; and

d. the information is not protected by a valid claim of privilege.

See United States Attorney's Manual § 9-2.161(a).

To obtain the required approval, staff should submit a memorandum to the Deputy Assistant Attorney General for criminal enforcement, through the Director of Criminal Enforcement, setting forth the factual circumstances, reasons for the request, and any information bearing on the standard the Assistant Attorney General must apply. The memorandum will be forwarded to the Assistant Attorney General for approval.

d. Notification of Matters Involving Foreign Government Interests

Various multilateral and bilateral agreements require the United States to notify foreign governments regarding antitrust activities affecting their interests. In accordance with Division Directive ATR 3300.2, "Notification of Antitrust Activities Involving Foreign Companies, Individuals or Governments," staff must notify the Foreign Commerce Section whenever Division attorneys undertake actions which may affect the interests of a foreign government. (For a list of actions which may trigger notification requirements, see Chapter VII, Section D.1. When a grand jury is involved, staff may need to obtain a 6(e) disclosure order prior to notifying the foreign government.[272]

12. Investigating Related Criminal Activity

The Antitrust Division often uncovers other criminal offenses while investigating Sherman Act violations. When appropriate, the Division will investigate and prosecute these offenses. At other times, the Division will refer them to the appropriate U.S. Attorney. Offenses the Division typically will investigate fall into two general categories: (1) violations that affect the integrity of the investigatory process and (2) violations that are related to the conduct under investigation as Sherman Act violations. Examples of crimes affecting the integrity of the investigatory process include making a false declaration before a grand jury (18 U.S.C. § 1623) and obstruction of justice (18 U.S.C. § 1503). Examples of related substantive crimes prosecuted by the Division in recent years include (a) conspiracy to defraud the United States (18 U.S.C. § 371); (b) false statements to a government agency (18 U.S.C. § 1001); (c) mail and wire fraud (18 U.S.C. §§ 1341 and 1343, respectively); and (d) tax offenses, (26 U.S.C. § 7201).

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[272] Notification prior to staff's first session with the grand jury may preclude the need to obtain a 6(e) order.

As set forth below, the Antitrust Division must consult with other Divisions or agencies prior to investigating or prosecuting certain offenses. While retaining the authority to conduct the investigation or prosecution, Antitrust Division staff may seek assistance from the Criminal Division or the appropriate United States Attorney's Office in conducting or prosecuting the matter.

a. Circumstances in Which the Division Investigates Related Criminal Activity

The Division investigates all offenses involving the integrity of its investigatory process. In addition, the Division typically investigates other substantive offenses when they occur in connection with an anticompetitive scheme. The Division exercises its prosecutorial discretion when determining whether the prosecution of crimes in addition to a Sherman Act violation is warranted. The Division also charges other crimes independently when appropriate.

The substantive offenses most commonly brought by the Division are conspiracy to defraud the United States, false statements to a government agency, and mail or wire fraud. A conspiracy to defraud count generally is considered when a government agency has been defrauded by a bid-rig or market allocation scheme. A false statement count generally is considered when an affidavit of non-collusion or certificate of independent bid price determination has been signed in connection with a rigged bid to a government agency. A mail or wire fraud count generally is considered when the U.S. mails or interstate wires are used in furtherance of an anticompetitive scheme or in instances of anticompetitive conduct that do not violate the Sherman Act (e.g., an unsuccessful attempt to fix prices or rig bids). The full texts of some of the statutes the Division has previously enforced are found in Chapter II.

With respect to tax offenses, the Division must coordinate all tax investigations with the Criminal Investigative Division of the Internal Revenue Service and obtain authorization from the Tax Division to conduct the grand jury investigation on its behalf. Typically, the Tax Division will assign an IRS special agent to work with Division staff. In accordance with the IRS and Tax Division review procedures, the special agent submits a written report to the Office of Regional Counsel for the relevant IRS region at the conclusion of an investigation. The Regional Counsel reviews the report to determine if there is sufficient evidence to justify prosecution, and if so, refers the matter to the Tax Division for its approval. Staff should indicate in its case recommendation memo whether Tax Division approval has been obtained or is pending; in the latter case, staff should notify the appropriate Special Assistant once the Tax Division approves. The Antitrust Division typically conducts the prosecution of tax matters it has investigated.

b. Procedures for Obtaining Criminal Division Clearance and Assistance

Federal regulations (28 C.F.R. § 0.179a) require other Divisions to consult with Criminal Division when investigating or prosecuting the following matters:

a. Obstruction of justice and obstruction of a criminal investigation (18 U.S.C. §§ 1501-1511);

b. Perjury and subornation of perjury (18 U.S.C. §§ 1621, 1622);

c. False declarations before a grand jury or court (18 U.S.C. § 1623);

d. Fraud and false statements in matters within the jurisdiction of a government agency (18 U.S.C. § 1001); and

e. Conspiracy to defraud the United States (18 U.S.C. § 371).

Upon request from a section or field office for authority to investigate or prosecute such offenses, the Assistant Attorney General or the Deputy Assistant Attorney General for criminal enforcement will notify the Assistant Attorney General, Criminal Division, or the appropriate Deputy Assistant Attorney General, of the proposed investigation or indictment. Upon notification, the Assistant Attorney General, Criminal Division, or the Deputy, will clear the investigation or indictment to the supervisory authority of the Antitrust Division. A record of this clearance will be kept in the case file.

G. Completing the Investigation and Recommending Civil or Criminal Suit

As the staff develops evidence that may establish a criminal or civil violation of the antitrust laws, it should begin to determine what type of case or cases, if any, will be recommended and how the investigation should be concluded. As indicated earlier in this chapter, the staff should be aware of local rules of court governing the filing of civil cases and the return of indictments. This is especially true where staff wishes to seek preliminary relief to stop an acquisition or other practice, inasmuch as district practices differ markedly.

1. Preparing to Recommend a Case

In considering recommending a case, the staff should make every effort to prepare its case fully during the investigation. The staff should not rely on the potential ability to develop a case using post-complaint or post-indictment discovery. The document production, interrogatory, and deposition powers of the Antitrust Division under the HSR Act and the Antitrust Civil Process Act, as well as voluntary interviews, declarations, and affidavits, should be fully utilized to prepare a prima facie presentation, as well as to be ready to meet potential contentions of the opposing side. The powers of the grand jury should likewise be used to develop all relevant information in a criminal investigation.

a. Consultation with Antitrust Division Economists

The expertise and capabilities of Antitrust Division economists should be fully utilized as a resource in thorough pre-filing preparation for litigation, particularly in merger and other civil matters. The Division's Economic Analysis Group assigns one or more economists to each merger and civil non-merger matter to assist the legal staff in investigating, developing, and analyzing the competitive effects of the proposed acquisition or other conduct being investigated. Among other things, the legal staff in civil matters should include such Division economists as participants in: formulating theories to investigate, drafting of HSR Second Requests and interrogatory and document CIDs, creating an investigatory plan designed to maximize the potential of developing a triable case, and in drafting and asking interview and CID deposition questions. Also, Division economists and the Division's Economic Analysis Group should participate fully in developing and implementing quantitative analysis of anticompetitive effects of mergers and other business conduct, and in providing or securing expert economic testimony.

b. Notification to Prospective Defendants

As the conclusion of an investigation nears, but before the field office, task force, or section makes a formal recommendation, the staff generally should afford counsel for the parties an opportunity to present their views to the staff and the Chief. The staff should make this offer to all counsel whose clients staff believes, in good faith, may be parties to a suit, and should not limit its notification to those as to whom it projects suit is highly likely. This practice allows the staff, after a single meeting or series of meetings, efficiently to evaluate the arguments of all prospective defendants and make a better informed assessment of the evidence based on information from such parties.

In general, counsel should be informed that the Division has identified competitive concerns, but that the Assistant Attorney General has made no determination about a suit. Counsel should not be informed that the Division has determined that the party will be sued or indicted, because the final

responsibility for making a decision to file suit or recommend an indictment rests with the Assistant Attorney General. Nor should counsel be told that the staff is recommending suit (without express authorization from the appropriate Director of Enforcement). Generally, counsel should be informed about the nature of the possible case, some of the categories of evidence that support it (without violating CID, HSR, or grand jury confidentiality provisions or exposing sources or potential witnesses), and, in civil cases, the possible scope of relief. This information should be conveyed to counsel sufficiently in advance of the meeting with staff and the section Chief so that counsel may respond.

At an appropriate point in the course of the Division's deliberations (but in any event after the staff has forwarded its recommendation), the staff also will usually inform counsel that it will forward any request of counsel for an appointment to meet on the matter with senior Antitrust Division officials. In general, parties who may be sued or recommended for indictment are usually afforded an opportunity to meet with a senior Antitrust Division official prior to a decision whether or not to file suit or seek an indictment. However, counsel are not entitled to such a meeting as a matter of right. If it is a close question about whether a meeting would or would not be useful, the appropriate Deputy Assistant Attorney General will advise staff whether there is or is not interest in hearing a presentation on behalf of a particular party. As a general rule, any argument which counsel for a prospective party wishes to be considered by senior officials must first be presented to the staff.

c. Dual Enforcement Policy ("Petite" Policy)

A number of states have enacted antitrust laws that provide for criminal penalties. This raises the question of under what circumstances a federal prosecution will be instituted or continued following a state criminal prosecution based on substantially the same act or acts. The problem has arisen, for example, in connection with bid rigging on state construction projects.

It is settled law that there is no constitutional bar to federal prosecution for the same offense as to which there has been a state prosecution. The Double Jeopardy Clause simply does not apply to this situation.[273] Further, while Congress has expressly provided that as to certain specific offenses a state judgment of conviction or acquittal on the merits shall be a bar to any subsequent federal prosecution for the same act or acts, it has not included violations of the antitrust laws in this category.[274]

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[273] See Abbate v. United States, 359 U.S. 187 (1959); Bartkus v. Illinois, 359 U.S. 212 (1959).

[274] See, e.g., 18 U.S.C. §§ 659, 660, 1992, 2102, 2117 and 15 U.S.C. §§ 80a-36, 1282.

Nonetheless, since 1959, the Department of Justice has followed the policy of not initiating or continuing a federal prosecution following a state prosecution based on substantially the same act or acts unless there is a compelling federal interest supporting the dual prosecution. This policy is known as the "Petite policy." [275] The Petite policy provides that only the appropriate Assistant Attorney General may make the finding of a compelling federal interest, and failure to secure the prior authorization of the Assistant Attorney General for a dual prosecution will result in a loss of any conviction through a dismissal of the charges, unless it is later determined that there was in fact a compelling federal interest supporting the prosecution and a compelling reason for the failure to obtain prior authorization. This policy is, of course, designed to regulate prosecutorial discretion in order to ensure efficient use of the Department's resources and to protect persons charged with criminal conduct from the unfairness that can be associated with multiple prosecutions and multiple punishments for substantially the same act or acts.[276]

This dual prosecution policy applies, and authorization must be obtained from the Assistant Attorney General for the Antitrust Division, whenever there has been a prior state proceeding (including a plea bargain) resulting in an acquittal, a conviction, or a dismissal or other termination of the case on the merits. It does not apply, and thus authorization is not required, where the state proceeding has not progressed to the stage at which jeopardy attaches, or was terminated in a manner that would not, under the Double Jeopardy Clause, preclude a further state prosecution for the same offense. For example, the Division will not hesitate to indict price fixers simply because they have already been indicted by a state.

Where the policy does apply, a subsequent federal prosecution may proceed only if the Assistant Attorney General makes a finding that there is a compelling federal interest supporting the dual prosecution. Thus, a federal prosecution will not normally be authorized after completion of the state proceeding unless the state proceeding left substantial federal interests demonstrably unvindicated. As a general rule, cases coming within the priority areas of federal jurisdiction, including the protection of free and unfettered competition under the antitrust laws, are more likely to meet this requirement. Thus,

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[275] In Petite v. United States, 361 U.S. 529 (1960), the Supreme Court granted the Solicitor General's petition to vacate the second of two federal subornation of perjury convictions after the government indicated its intention to avoid successive federal prosecutions arising from a single transaction, just as it had earlier announced that it would generally avoid duplicating state criminal prosecutions.

[276] See Rinaldi v. United States, 434 U.S. 22, 27 (1977).

as a general rule, the Division will be inclined to authorize federal antitrust prosecution despite dismissal of, or an acquittal on, parallel state charges, most particularly when there is a substantial basis for believing that the state result was affected by (1) blatant disregard of the evidence by the court or jury, (2) the failure to prove an element of the state offense that is not an element of the federal offense, (3) the unavailability of significant evidence in the state proceeding either because it was not timely discovered or because it was suppressed based on state law grounds or on an erroneous view of federal law, or (4) other substantial prejudice to the state's prosecution.

Even where a state prosecution results in a conviction, there are certain circumstances in which the Division would be inclined to authorize dual prosecution. It is the Division's policy that culpable individuals should be sentenced to incarceration. Accordingly, dual prosecution may be authorized in cases where the Division anticipates an enhanced sentence in its case. This may include situations where the state conviction was for a misdemeanor whereas the Sherman Act violation is a felony. A subsequent federal prosecution may also be warranted where either the state antitrust charge carried a maximum penalty substantially below the maximum Sherman Act penalty, or the choice by the state prosecutor or grand jury of the state charges, or the state court determination of the severity of the sentence, was affected by any of the factors noted earlier as strengthening the Division's inclination to authorize federal antitrust prosecution after state acquittal or dismissal.

Finally, dual prosecution will not generally be authorized where there has been a state antitrust prosecution that resulted in a conviction and reasonable sentence. Moreover, even when the state prosecution results in acquittal, dual prosecution will not be authorized if the state prosecutors offered essentially the same evidence the Division would offer, and there was no reason to believe that the verdict of acquittal reflected anything but a good faith reasonable doubt on the part of the judge or jury.

Additional information on the dual prosecution policy may be found in United States Attorney's Manual § 9-2.142.

2. Case Recommendation Procedures

Upon completing its investigation of the evidence and evaluation of enforcement options, the staff, in consultation with the Chief, should prepare a case recommendation materials for the Division's front

office communicating staff's summary of the evidence, assessment, and recommendation.[277] In addition to evaluating the strengths and weaknesses of the evidence, the staff's assessment should evaluate the main settlement or disposition options. Such advance evaluation of settlement prospects is important, because, when a matter is submitted to the appropriate Deputy Assistant Attorney General and the Assistant Attorney General, the pace of developments often will accelerate, leaving little time for additional study, particularly in fast-track merger matters. Although the staff has a close familiarity with the evidence and parties involved, the materials should be drafted with a view towards fully explaining the case to individuals with less detailed knowledge of the industry and facts, e.g., the Chief and the front office.

The case recommendation package submitted by the staff should typically consist of the case recommendation memorandum,[278] draft pleadings, a proposed press release (where applicable), and the other documents and any other papers deemed most relevant to full consideration of the critical and contested elements, strengths and weaknesses of the case. Because procedures vary somewhat depending on the type of case, unique features of civil non-merger, merger, and criminal case recommendations are described below. To help ensure that recommendations are in the format currently preferred by the Front Office, the Special Assistant who is assigned to the particular component will, upon request, provide an exemplar of a current case recommendation memorandum that has been well received.

The staff should always submit the case recommendation memorandum and accompanying materials to the Chief for review. The Chief will analyze the matter and send the recommendation materials to the appropriate Director, Deputy Assistant Attorney General and other appropriate Front Office personnel, sometimes with, and sometimes without, a separate memorandum expressing the Chief's individual views. In either case, the Chief's recommendation should be clearly indicated. The

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[277] In the event that staff believes that a civil or criminal suit is not warranted, staff should prepare a closing memo detailing the reasons. The concurrence of the Chief should be indicated and the memo should be e-mailed to the Special Assistant responsible for the component. For more details on closing memos, see supra Section C.7. In a merger case, if the staff recommends closing prior to the parties substantially complying with the Second Requests, the waiting period will need to be terminated as discussed above. See supra Section D.1.e.

[278] Case recommendation memorandums vary somewhat depending on type of case and are discussed further below. Because the preferences of the Front Office reviewers may vary over time, staffs may want to check with the appropriate Special Assistant to obtain an exemplar of a recently submitted and favorably received case recommendation memo.

case recommendation materials must be delivered to the front office sufficiently in advance of any meeting between representatives of the prospective defendants and senior Division officials to permit a meaningful advance review of the material submitted. Because procedures vary depending on the type of case, a more specific description for procedures for civil non-merger, merger, and criminal cases follows.

a. Recommending a Non-merger Civil Action

Staff recommendations relating to civil non-merger cases will vary according to the nature and complexity of the matter under consideration. If settlement is uncertain, the case recommendation should include at least:

- A brief (one paragraph or less) description of what the prospective case is fundamentally about;

- A conceptual discussion of the case and why it is an important one for the Division to bring, including the theory and statute(s) on which a case is recommended; the elements of the theory and statute(s) being relied upon; theories investigated but not recommended to be pursued; and the justifications or defenses likely to be raised by the prospective defendants;

- An assessment of whether the case is winnable at trial, including a short order of proof (which will typically be attached to the case recommendation as a separate document), a summary of the relative strengths and weaknesses of the evidence supporting the case, and a summary of likely defense evidence and arguments; and

- A discussion of potential settlement options.

Although the staff's recommendation should cover all elements and aspects of the prospective case, it should emphasize and focus on the areas most in dispute and likely to pose the greatest difficulties for the Division at trial. The recommendation should be balanced and objective in tone, and not an attempt to sell the case to the front office.

The recommendation may be accompanied by copies of a small number of key documents deemed by the staff to be the most significant evidence to the critical aspects of the case, although the staff should exercise care (in both the drafting of the recommendation and the attachment of exhibits) not to append such a large volume of materials that attention to the most critical ones is likely to be

obscured. In addition, the staff should attach a draft of the proposed complaint and proposed press relief. Any other court papers to be filed with or shortly after the complaint (i.e., a draft PI brief) should also be attached.

If settlement is likely, the case recommendation package should include (in addition to the case recommendation memo), a draft complaint, consent decree, stipulation, competitive impact statement, press release, Federal Register notice, and newspaper notice. See infra Chapter IV, Section E (discussing consent decrees). The case recommendation memo should contain the same basic elements as those discussed above for unresolved cases; however, it is usually not necessary to submit a order of proof or detailed discussion of the evidence and trial risks. The case recommendation memo should, however, contain a discussion of why the case is significant, its theory, and an objective analysis of the advantages and disadvantages of the proposed consent decree.

b. Recommending Merger Cases

Staff should keep the Director of Merger Enforcement informed as a prospective merger case moves towards settlement or litigation. The procedure for recommending merger cases varies depending upon whether staff has been able to reach what it views as an acceptable resolution with the parties.

In the event that the staff is able to reach a proposed settlement with the parties, the case recommendation memo should be similar to that described below, except that it need not contain an extensive analysis of the evidence but should include a discussion of how the proposed resolution will adequately resolve the identified competitive problem. The case recommendation package should include (in addition to the case recommendation memo), a draft complaint, consent decree, stipulation, competitive impact statement, press release, Federal Register notice, and newspaper notice. In some cases, the parties may agree to a resolution that eliminates the potential competitive problem before the merger is consummated--a "fix-it-first" solution. Because such a resolution does not involve a case being filed, no complaint, stipulation, competitive impact statement, Federal Register notice, or newspaper notice is necessary. However, a recommendation memo and draft press release should still be forwarded along with any documents necessary to understand the proposed resolution (i.e., a completed agreement divesting certain assets; a completed license for certain intellectual property; etc.).

In the event that no resolution has been reached, it is likely that the parties will want to meet with the Director of Merger Enforcement and the appropriate Deputy Assistant Attorney General. The decisionmaking process with respect to case recommendations will be greatly facilitated if the staff is

prepared, no later than the week before any meeting with opposing parties, to deliver to the appropriate Deputy Assistant Attorney General and the Director of Merger Enforcement a brief case recommendation memo, an order of proof (of the type described below), any white papers or economic studies from the merging parties, and a draft complaint. Such materials should, in any event, be submitted to the Front Office no later than 48 hours before any meeting with the parties. Immediately following the meeting with parties, staff should finalize its draft complaint; TRO filing papers, declarations, and exhibits; and preliminary injunction filing papers, declarations (including economist declaration) and exhibits. By this time, the staff should be prepared to demonstrate mock closing statements for the government and the defense, and mock direct and cross examination of the government's expert economist.

The case recommendation memo should be brief and contain: the date by which the Division must file any TRO or PI papers and any other dates that bear on timing; a brief description of the transaction (including the identity of the merging parties, the form of the transaction, and the consideration); a brief description of the proposed suit (including proposed defendants, the statutes under which the merger is to be challenged, the proposed judicial district, and the relief sought); a general description of the impact of the transaction (including the relevant product and geographic markets, volume of commerce, market shares, and HHIs); a brief description of the basic theory of competitive harm; and a short discussion of the weaknesses of the case (i.e., the principal contentions of the merging parties and which are most troublesome). Unusual factual, evidentiary, equitable, relief or legal issues or factors with a direct impact on any exercise of prosecutorial discretion on the decision to challenge the merger should also be addressed. The memo should state staff's recommendation as of the date the memo is submitted. Any settlement possibilities should be addressed, and the memo should answer the question why is litigation of this matter worth the expenditure of the necessary Division resources. The Chief's recommendation also needs to be communicated--either in the recommendation memo or in a separate memo if the Chief believes that other things need to be said.

The case recommendation memo should be accompanied by an order of proof in outline format (which staffs should generate over the course of an investigation). The order of proof should follow the elements of the case, using the Merger Guidelines as a framework, and should include relevant quotations from documents (or attach highlighted key documents) and relevant portions from key transcripts, as well as summarize any quantitative evidence developed by EAG. The order of proof for a merger challenge should identify the key issues in the case, the strength or weaknesses of the evidence by element, contentions of the merging parties, and a summary of the way staff will meet those contentions. Time and circumstances permitting, appendices to the recommendation memo and order of proof should include copies of the prospective exhibits and other litigation materials.

The recommendation of the economists assigned to the merger should be indicated either in the staff's recommendation memo or a separate memo. The legal staff should ensure that the economists have an opportunity to review the case recommendation memo and order of proof so that they may provide material for insertion or write a complementary memo; similarly, the economists should ensure that the legal staff has an opportunity to review any separate memo that they write.

c. Recommending a Criminal Case

If a matter is being conducted before a grand jury, staff should identify the targets of the investigation. "Target" is defined as a person "as to whom the prosecutor or the grand jury has substantial evidence linking him/her[/it] to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant. An officer or employee of an organization which is a target is not automatically to be considered as a target even if such officer's or employee's conduct contributed to the commission of the crime by the target organization, and the same lack of automatic target status holds true for organizations which employ, or employed, an officer or employee who is a target." United States Attorney's Manual § 9-11.150. A "subject" of an investigation, on the other hand, is a person or entity "whose conduct is within the scope of the grand jury's investigation." Id.

The Division will follow the Department's practice of informing individuals under certain circumstances that they are targets of the investigation. See United States Attorney's Manual § 9-11.153. In those circumstances where the individual wishes to appear before the grand jury voluntarily, see id. § 9-11.152, the target should be informed that he or she will be required to explicitly waive his or her privilege against self-incrimination and that the Division attorneys may examine the person on all relevant information. Accordingly, the person may not simply read a statement and then leave the grand jury room.

The staff ordinarily will inform defense counsel that the Division is seriously considering recommending indictment and counsel may present its views to the staff and section, task force, or field office Chief. As previously discussed, the staff should never inform counsel that the corporations or individuals will be indicted. Rather, counsel should be informed that the Division is seriously considering such a recommendation to the grand jury. This procedure applies to those corporations and individuals whom the staff believes pose close questions, as well as those who may ultimately be recommended for indictment.

Counsel for both corporate and individual defendants should be afforded an opportunity to meet with the staff and Chief regarding the recommendation being considered. Counsel should be encouraged

to present all arguments as to why it would be unwise or inappropriate--for factual, legal, or prosecutorial policy reasons--to recommend indictment of their client. If the staff, after listening to the views of counsel, believes a case is appropriate, a case recommendation package should be prepared and e-mailed it to the CRIM-ENF mailbox with a cc to the appropriate Special Assistant.

Counsel do not have any absolute right to be heard by the Director of Criminal Enforcement or the Deputy Assistant Attorney General for criminal enforcement ("criminal DAAG") although the Director and the criminal DAAG will ordinarily give counsel an opportunity to be heard before recommending an indictment to the Assistant Attorney General. Only in very unusual circumstances will counsel be granted a meeting with the Assistant Attorney General. The criminal DAAG, in his or her discretion, will ordinarily consider the arguments of counsel in making a final recommendation, but only after counsel has already met and discussed the issues with the staff. It should be noted that neither the criminal DAAG nor staff can disclose all relevant factual details to counsel since the secrecy provisions of Rule 6(e) of the Federal Rules of Criminal Procedure apply to the evidence developed before the grand jury.

(i) Recommending an Indictment

Case recommendation packages for an indictment should be addressed to the criminal DAAG, through the Director of Criminal Enforcement. When sent forward, the case recommendation memo should be adopted by the Chief or accompanied by a Chief's cover memorandum. Chiefs must make clear their positions on all staff case recommendations, including each count recommended against each defendant. Chiefs may either work with the staff in preparing the case recommendation and sign on to the staff memorandum, or Chiefs may submit a separate case memorandum if their positions differ from the staff's position. Cover memos, however, should be analytical. Chiefs should not submit pro forma, non-analytical cover memos. The case recommendation packet must also include all pleadings in the matter, a press release (see infra Chapter VII, Section G.1), and a list of counsel who have requested a meeting with the criminal DAAG. In addition, the AMIS "New Matter" form should be sent to the Premerger Notification Unit/FTC Liaison Office by e-mailing it to the AMIS mailbox. See Division Directive ATR 2810.1, "AMIS."

When recommending an indictment, the case recommendation memo should typically contain the following sections:

(a) Table of Contents

A table of contents should be prepared listing the various headings and subheadings in the memorandum with the corresponding page numbers.

(b) Summary of Offense

The first section of the memorandum should be a brief narrative of the conduct alleged as a violation. It should contain an overview of the conspiracy, organized chronologically, if possible. One way to view the summary section is as a fleshing-out of the Indictment. The summary section should include at least the following:

(1) The statute violated;

(2) The judicial district in which the proposed indictment would be returned, and the expiration date of the grand jury;

(3) The number of proposed corporate and individual defendants. If they are few in number, they may be listed here together with the company affiliation and position of individual defendants. If the number is fairly large, the names and other information should be set forth in a separate section immediately following the summary;

(4) The level of product distribution -- manufacturers, wholesalers, retailers;

(5) The product involved;

(6) The area involved in the conspiracy, e.g., nationwide or a particular geographic area;

(7) The amount of commerce affected on an annual basis;

(8) The duration of the conspiracy;

(9) A brief summary of the evidence indicating how the conspiracy was formed and carried out;

(10) A reference to any problem the staff perceives, such as the statute of limitations, interstate commerce, multiple conspiracy problems, etc; and

(11) Prospects for resolution of the matter by plea agreement.

(c) Proposed Defendants

The proposed corporate defendants should be listed and described. The proposed individual defendants should be listed, together with their company affiliation and the positions each held during the conspiratorial period.

(d) Order of Proof/Summary of the Evidence

This section should set forth the evidence establishing the conspiracy. The staff should view this section as an order of proof--setting forth the elements necessary to prove the crime and the evidence in support of each element. To the extent possible, witnesses and documents should be organized in the order in which we intend to present the matter at trial. Discussion should include the grounds for admissibility of evidence, where appropriate. Staff should consider attaching relevant portions of transcripts of crucial grand jury witnesses in addition to copies of important documents.

(e) Summary of the Evidence Against Each Proposed Defendant

In a separate section, the evidence against each proposed corporate and individual defendant should be separately summarized. Staff should view this section as akin to a draft closing argument. In addition, other factors that have been considered and that may be significant in making defendant selection decisions should be described, including a personal profile, detailing information such as age, state of health, personal or business hardship, etc.

(f) Persons and Companies Not Recommended for Indictment

In a separate section, the fact memorandum should list the persons and companies that were potential targets of the investigation but are not being recommended for indictment. The evidence against each must be summarized, and the staff must set forth the reasons why indictment is not recommended. Relevant factors, such as the extent of cooperation, age, state of health, unusual hardship, etc., should be described. Staff should explain the impact of the decision not to indict on the triability and overall jury appeal of the proposed case.

(g) Weaknesses and Defenses

The staff should include a detailed analysis of the weaknesses of the case, and any anticipated defenses, with appropriate staff responses. Matters to be addressed include witness vulnerability, credibility problems, evidentiary problems, and potential for jury nullification. Likely defense motions should also be addressed.

(h) Arguments of Counsel and Staff Responses

This section should identify defense counsel for the proposed defendants and describe arguments made to the staff. Reference may be made to the weaknesses and defenses section. Other arguments, such as appeal to prosecutorial discretion or leniency, should be laid out and addressed with staff responses.

(i) Victims of the Violation and Staff Compliance with the Victim and Witness Protection Act of 1982 and Related Statutes

Some of the descriptions in this section may be tentative at the case recommendation stage, but there should be as complete a discussion as possible of who the victims of the violation are, how they have been harmed, and how we will fulfill our responsibility to protect their rights as set forth in the Attorney General Guidelines for Victim and Witness Assistance (1995). At a minimum, the memorandum should identify and discuss:

(1) the victims' rights issues presented by the violation;

(2) what victim services are appropriate under the circumstances (e.g., information/referral, protection from harassment/intimidation, consultation/notice, restitution); and

(3) how and when those services have been or will be provided.

Questions to be considered in drafting this section include: Have we already had, or are we likely to have, formal or informal contact with these victims? Have victims received victim notification letters, information pamphlets, and checklists and, if not, will they? Will there be an opportunity to consult with victims concerning the filing of charges or the disposition of the case? Have the victims sought our assistance in recovering restitution and, whether they have or not, is restitution appropriate or possible? How will we be assisting the victims and/or the probation office to complete the VIS?

(ii) Recommending a Plea Agreement

Recommendations to file an information and enter into a plea agreement should be addressed to the criminal DAAG, through the Director of Criminal Enforcement if it is the first case to arise from an investigation, or to the Director of Criminal Enforcement if it is not the first case. If the staff is able to reach what appears to be a reasonable resolution of the potential criminal charges, staff should prepare a case recommendation memo setting forth, at a minimum, the following:

- A brief description of the proposed charges;

- A description of the illegal conduct and an analysis of the available evidence demonstrating the existence of that conduct;

- A brief description of the elements of the proposed plea agreement, with a more detailed explanation of any unique provisions, and an analysis of the potential criminal penalty pursuant to the United States Sentencing Commission's Federal Sentencing Guidelines;

- A description of the potential charges faced by the proposed defendant, had the case proceeded to Indictment;

- The analysis of the benefits and disadvantages of the proposed plea agreement, including the impact of the proposed agreement on any continuing investigation or future trial.

- A discussion of relevant victims' rights issues, including: (i) whether there has been, or will be, an opportunity to consult with the victims of the offense concerning the proposed plea agreement; (ii) whether and how the victims of the violation will be notified of the final resolution of the case; and (iii) if the plea agreement does not provide for restitution to the victims of the offense, why restitution is not necessary, appropriate or obtainable. This assessment should include whether the defendant has sufficient resources to satisfy any future damage award to victims of the offense in addition to paying the criminal fine if restitution is not provided. If the defendant has already paid damages to the victims or an agreement to do so has already been reached, that should be noted as well.

Just as with a recommendation for an indictment, the recommendation memorandum should be forwarded with all appropriate pleadings in the matter (typically, a draft Information and Plea Agreement), a press release (see infra Chapter VII, Section G.1), and the original and two copies of

a completed AMIS "New Matter" form. See Division Directive ATR 2810.1, "AMIS."

3. Procedures for Review of Case Recommendations

Once the staff has made its submission and any meeting(s) with counsel for prospective defendants have been conducted, the Division's reviewers assess the merits of the case with a view towards considering all matters consistently and fairly. At the conclusion of the review process, the Assistant Attorney General makes the final decision as to whether to bring the action or to decline prosecution.

The Assistant Attorney General will review the staff recommendation along with the recommendation of the reviewing Director of Enforcement and Deputy Assistant Attorney General. In some civil matters, but only rarely in criminal matters, counsel for the potential defendants may also be provided with an additional opportunity to make a presentation to the Assistant Attorney General.

When a final decision is made by the Assistant Attorney General, staff will be informed immediately. If a case is to be filed, the matter will be returned to the staff with the approval papers, signed pleadings, and any other information that will be required for filing. At that point, the staff will commence litigation of the matter or make its presentment to the grand jury.

In both civil and criminal actions, the staff must inform the office of the appropriate Director of Enforcement 24 hours in advance of the date on which the case is to be filed so that a press release may be finalized for publication. Immediately after the case has been filed, the staff must advise the office of the Director so that issuance of the press release may be authorized in a timely fashion.[279] Staff should inform the office of the appropriate Director of the docket number and judge assigned to the case. For procedures following the initiation of litigation, see infra Chapter IV.

H. Other Investigative Functions

1. Business Review Procedures

Under the Antitrust Division's Business Review Procedure, 28 C.F.R. § 50.6, business entities

[279] At the time a case is filed, staff should follow the procedures set forth in Chapter VII, Section G relating to the Department's press policy.

can ascertain the Division's current enforcement intentions with respect to proposed business conduct.[280]

a. Origin and Development of Procedure

This procedure had its origin in what were know as "railroad release" letters, the first of which was issued by the Division in 1939. Under the "railroad release" procedure, the Division would review proposed business conduct and state whether it would forego the initiation of criminal proceedings should the proposed conduct be carried out. This was subsequently expanded to include a merger clearance procedure under which the Division would state its present enforcement intentions with respect to a merger or acquisition. In 1968, these practices were formalized as the Business Review Procedure, and regulations describing the procedure were issued at 28 C.F.R. § 50.6.[281] The Hart-Scott Rodino Antitrust Improvements Act of 1976 eliminated much of the need for a business review procedure in the merger context. Today, the business review procedure is only used to evaluate potential civil, non-merger, conduct; with the exception of a very limited number of health care mergers, the Division as a matter of policy does not conduct business reviews for proposed mergers.

b. Purpose

The Business Review Procedure provides substantial benefits to the Division and to the business community. From the Division's perspective, the procedure is beneficial since it brings to the Division's attention proposed business conduct that may be of questionable legality and provides a mechanism by which a speedy investigation can be carried out. The business community benefits by having a procedure that enables it to avoid costly litigation and other business problems that may arise when a company is involved in antitrust litigation with the government. See Green v. Kleindienst, 378 F. Supp. 1397, 1398-99 (D.D.C. 1974).

c. Manner of Request

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[280] The Division's FOIA Unit maintains a file and cross-referenced index of all business review letters issued since 1968. Copies of these letters are available upon request. The Division also periodically publishes a digest of these letters, which is indexed by commodity, entity, and date, and is circulated to the sections and field offices. It is also available to the public.

[281] The regulations were issued on February 1, 1968, see 33 Fed. Reg. 2,422, and have been revised twice, see 38 Fed. Reg. 34,804 (1973); 42 Fed. Reg. 11,831 (1977).

The business review process is initiated by a written request to the Assistant Attorney General.[282] At the outset, or at any time it appears appropriate, the Division in its discretion may refuse to consider the request. Such a refusal would occur where the request did not qualify for business review treatment. This most frequently involves requests relating to ongoing business conduct, since only proposed business conduct is eligible for consideration. Where the business conduct is subject to approval by a regulatory agency, a business review request may be considered before agency approval has been obtained only where it appears that exceptional or unnecessary burdens might otherwise be imposed on the requesting party or where the agency specifically asks the requesting party to seek a business review letter. In any event, the procedure relates only to enforcement intentions under the federal antitrust laws, not under any other federal or state statute or regulatory scheme. See 28 C.F.R. § 50.6(7)(a).

d. Processing the Request

The Office of Operations logs the incoming request and refers the request to: Health Care Task Force (for all health care business reviews), or the attorney or attorneys designated by the Assistant Attorney General to handle non-health care requests. The assigned attorney then follows the normal procedure to obtain preliminary inquiry authority. A memorandum requesting authority must be e-mailed to the "PI Request" Mailbox and the appropriate Special Assistant in Operations, and FTC clearance must be obtained before the review takes place. See supra Section B. An AMIS "New Matter Form" (ATR 141) should be prepared and forwarded simultaneously with the request for preliminary inquiry authority. See Division Directive ATR 2710.2, "File Numbers"; Division Directive ATR 2810.1, "AMIS." As with any other investigation, no contacts with parties other than the requesting party (with the exception of other federal government agencies) should be made before preliminary inquiry authority is obtained.

e. Timing of Investigation

Requests for a business review letter should be handled as expeditiously as possible. Absent unusual circumstances, responses to such requests should be made within 90 days of the receipt of all necessary information from the requesting party. Special deadlines govern business reviews concerning

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[282] The initiation of a business review request does not in any way alter the responsibility of a requesting party to comply with the premerger notification provisions of the Hart-Scott-Rodino Antitrust Improvements Act of 1976. See 28 C.F.R. § 50.6(7)(b).

export trade and health care. Export-related requests are to be answered within 30 business days from the date that the Division receives all relevant data concerning the proposed transaction. Business review requests regarding any health care matter addressed in the "Statements of Antitrust Enforcement Policy in Health Care," issued by the Department and the Federal Trade Commission, except requests relating to multiprovider networks and hospital mergers outside the Statement 1 safety zone, are to be answered within 90 days after the Division receives all necessary information concerning the proposal. Requests regarding multiprovider networks or other non-merger health care matters are to be answered within 120 days after the Division receives all necessary information.[283]

In 1992, the Department adopted a pilot procedure to expedite the processing of business review requests for joint ventures and information exchange programs. See 58 Fed. Reg. 6132 (1992). Under that procedure, parties can submit with their request certain specified documents and information in order to expedite the investigative process. The types of information listed are those items that are typically requested by the Division after initial review of a request. By submitting these items with their request, parties can help speed the overall process. The Department committed at the time to use its best efforts to respond within 60 to 90 days when all relevant information was submitted with the initial request. Since 1992, many business review requesters have referred to the pilot program for guidance in preparing their initial requests, and Division attorneys have advised those seeking pre-submission advice to consult the pilot program to determine what types of information they should send with their request.

f. Investigating a Business Review

Under the business review regulations, the requesting parties are under an affirmative obligation to provide the Division with all information and documents in their possession that the Division may need to review the matter. See 28 C.F.R. § 50.6(5). The Division may also request additional information from the party or parties seeking review. Staff attorneys should also conduct whatever independent investigation they deem necessary. The staff is encouraged to involve the economist assigned to the matter in their investigation, and where appropriate, may also wish to seek the assistance of the Legal Policy Section.

g. Review Procedures

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[283] There is no time deadline for answering any business review request regarding a health care merger other than the 90-day deadline for mergers within the Statement 1 hospital merger safety zone.

After examining a business review request, the Division may state its present enforcement intentions with respect to the proposed business conduct, decline to pass on the request, or take such other position or action as it considers appropriate. See 28 C.F.R. § 50.6(8). Generally, the Division provides the party seeking the business review with one of three responses: (a) that the Department of Justice does not at present intend to bring an enforcement action against the proposed conduct; (b) that the Department of Justice declines to state its enforcement intentions; or (c) that the Department cannot state that it would not challenge the proposed conduct if it is implemented. The second response means that the Division may file suit should the proposed conduct be implemented, while the third response indicates that a challenge is probable.[284]

Generally, each letter sets forth (a) the procedural history of the request; (b) a description of the representations made by the requestor; (c) a statement of the Division's enforcement intentions; and (d) a description of the Division's procedures in making public the information in the business review file. A business review letter must be signed by the Assistant Attorney General, or, in his or her absence, by the Acting Assistant Attorney General.

The staff should prepare a memorandum with its recommendations and submit a draft business review letter setting forth the Division's position. The section, task force, or field office Chief should review the staff recommendation and the business review letter and submit them, together with the Chief's recommendation, to the senior counsel or other individual designated by the Assistant Attorney General to review business review letters. Staff should also submit a draft press release. After review by the designated individual, the matter will be reviewed by the Assistant Attorney General.

At the same time the Division notifies the requesting party of the Division's action on the business review request, a press release is issued describing the action and attaching a copy of the Division's letter of response. Also at this time, the letter requesting the business review and the Division's letter in response are indexed and placed in a file in the Division's FOIA Unit and are available for public inspection. Thirty days after notification, the information supplied in support of the business review request is also placed in the publicly available file unless the submitter has requested confidential

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[284] Because the Division is reluctant to commit to a lawsuit (which might consume considerable resources) in a business review letter and because the Division cannot be sure that it would initiate an enforcement action absent a full investigation, the Division rarely states in a business review letter that is likely to challenge proposed conduct. Language indicating that the Division "cannot state that it will not challenge" the proposed conduct is widely understood as a "negative" response and as indicating that the Division sees a competitive problem with the proposed conduct.

treatment for that information.

The business review regulations provide that information submitted by a requesting party may be withheld from disclosure to the public upon a showing that disclosure would have a detrimental effect on the requesting party's operations or its relations with customers, employees, suppliers, stockholders, or competitors. See 28 C.F.R. § 50.6(10)(c). Since the amendments to the Freedom of Information Act in 1974, no court cases have discussed the status under that Act of materials supplied to the government in connection with a business review request. However, the type of information generally withheld from public disclosure is confidential commercial or financial information. Such information is not subject to compulsory disclosure under the Freedom of Information Act. See 5 U.S.C. § 552(b)(4).

h. Judicial Interpretation and Review

It is important to note that a business review letter states only the enforcement intentions of the Division as of the date of the letter, and the Division remains completely free to bring whatever action or proceeding it subsequently determines is required by the public interest.[285]

Where the Division has stated a present intention not to bring suit, the Division has never subsequently exercised its prosecutorial discretion to bring a criminal action if there was full disclosure at the time the business review request was presented to the Division. See 28 C.F.R. § 50.6(9).

On only one occasion has judicial review been sought of the Division's statement of its present enforcement intentions in a business review letter. This occurred in Holly Farms Poultry Industries, Inc. v. Kleindienst, 1973-1 Trade Cas. (CCH) ¶ 74,535 (M.D.N.C. 1973), where the Division had declined to state a present enforcement intention not to bring an antitrust action against Holly Farms should it become a member of the National Broiler Marketing Association. Holly Farms sought judicial review of this decision, claiming jurisdiction under the Administrative Procedure Act, 5 U.S.C. §§ 701 to 706. The court, relying on 5 U.S.C. § 701(a)(2), dismissed the suit, holding that the decision of whether or

[285] See United States v. Grinnell Corp., 30 F.R.D. 358, 363 (D.R.I. 1962) (holding that the Department of Justice's statement of a "present intention not to take action" cannot be equated with future immunity); see also United States v. New Orleans Chapter, Associated Gen. Contractors of America, Inc., 382 U.S. 17 (1965), rev'g 238 F. Supp. 273 (E.D. La. 1965); United States v. E.I. duPont de Nemours & Co., 353 U.S. 586, 597-98 (1957); United States v. Firestone Tire & Rubber Co., 374 F. Supp. 431, 434 n.1 (N.D. Ohio 1974).

not to bring an action for violation of the antitrust laws is sufficiently committed to the discretion of the Attorney General to remove it from the group of judicially-reviewable actions. See 1973-1 Trade Cas. ¶ 74,535, at 94,382. In reaching its decision, the court relied in part on the fact that Holly Farms' inquiry concerned a proposed course of conduct. In dicta, the court suggested that there might be a different result where there was reliance on an earlier ruling and actual present conduct subjecting the inquirer to prosecution.[286] See id. at 94,383. Of course, an inquiry concerning actual present conduct would not qualify for treatment under the business review procedure.

2. National Cooperative Research and Production Act of 1993[287]

a. Purpose and Policy

The National Cooperative Research and Production Act of 1993 ("NCRPA" or "Act"), 15 U.S.C. §§ 4301-06, is designed to promote innovation, facilitate trade, and strengthen the competitiveness of the United States in world markets by clarifying the applicability of the rule of reason standard to the antitrust analysis of joint ventures and establishing a procedure under which persons may notify the Department of Justice and Federal Trade Commission ("FTC") of their cooperative ventures. The NCRPA provides parties to such ventures the opportunity to limit any possible monetary damages that might be sought from them in actions brought under the antitrust laws to actual--as opposed to treble--damages. However, this damage limitation provision does not apply to a joint venture's production of a product, process, or service unless (1) the principal facilities for such production are located in the United States or its territories, and (2) each person who controls any party to such venture (including such party itself) is a United States person or a foreign person from a country whose law accords antitrust treatment no less favorable to United States persons than to such country's domestic

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[286] In Greenbrier Cinemas, Inc. v. Bell, 511 F. Supp. 1046 (W.D. Va. 1978), the court held that a press release by the Department of Justice threatening legal action against so-called split-of-product agreements among motion picture exhibitors was judicially reviewable under the Administrative Procedure Act. The press release stated that the Department considered split agreements to be a per se violation of the antitrust laws and that continuation of such agreements after a particular date would subject the participants to legal action. It was emphasized in the press release that this represented a change in the Department's position. This matter did not involve a business review request.

[287] The National Cooperative Production Amendments of 1993, Pub. L. No. 103-42, amended the National Cooperative Research Act of 1984, Pub L. No. 98-462, renamed it the National Cooperative Research and Production Act of 1993, and extended its provisions to joint ventures for production.

persons with respect to participation in joint ventures for production.[288]

The legislative history of the NCRPA indicates that the phrase "whose law" is intended to include "not only a country's domestic antitrust law but also all international agreements and other binding obligations to which that country and the United States are parties."[289] Thus, a country that is a party to certain international agreements with the United States such as treaties of Friendship, Commerce and Navigation, Bilateral Investment Treaties, Free Trade Agreements, and various OECD instruments, satisfies the requirements of Section 7(2).[290] This includes most counties.

The rule-of-reason and attorneys' fees provisions of the NCRPA automatically apply to all joint ventures covered by the Act. However, eligibility for the Act's detrebling provision depends on the filing of a notification with the federal antitrust enforcement agencies. In order to obtain damage protection, any party to a joint venture covered by the Act may, not later than 90 days after entering into a written agreement to form the venture, file simultaneously with the Attorney General and the Federal Trade Commission a written notification disclosing the identities of all parties to the venture and the nature and objectives of the venture. In the case of a joint venture one of whose purposes is the production of a product, process, or service, the notification must contain additional information: the nationality of all parties and the identity and nationality of all persons who control any party to the venture, whether separately or with one or more other persons acting as a group for the purpose of controlling such party. An original and one copy of the notification along with copies of a proposed Federal Register notice must be filed with the Division, and one copy must be filed with the FTC.

b. Notification to Justice Department and the FTC

Notifications filed under the Act should make clear the identity of all parties to the venture. The list of parties should include "the real parties in interest."[291] Notifications should also include a description of the nature and objectives of the venture, including a concise statement of its purposes. Parties filing notifications of joint ventures for production should state clearly that a purpose of their

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[288] See Pub. L. No. 103-42, § 7, 15 U.S.C. § 4306.

[289] H.R. Rep. No. 103-94, at 20 (1993).

[290] See id.

[291] Joint Explanatory Statement of the Committee of Conference on S. 1841, H.R. Rep. No. 98-1044, at 19 (1984).

venture is production. They should also provide the nationality of all parties and the identity and nationality of all persons controlling such parties. The meaning of "control" of any party is intended to mean having the power to direct the management or policies of a person. This controlling influence may be exercised either directly or indirectly and the means used can vary. For example, it may be exercised through the ownership of voting securities, through a contractual right, or through participation on the board of directors.[292] In the case of a corporation, parties should provide the name, place of incorporation and location of principal executive offices. In the case of an unincorporated firm, comparable identifying information should be provided.[293]

In general, the manner and extent of the notification is left to the parties; they are to exercise their own discretion in determining the quantity and form of the information required adequately to describe the nature and objectives of their venture.[294] Parties should be aware, however, that the damage protection of the Act is dependent on the adequacy of their notification. Such additional notifications as are appropriate to extend the Act's protection to new or different activities undertaken by a joint venture or to disclose changes in membership also must be filed. In order to maintain the protection of the Act, a joint venture must file a notification disclosing any change in its membership within 90 days of the change. All written notifications filed pursuant to the Act should be delivered to each of the following offices:

Department of Justice
Antitrust Division
Premerger Notification Unit
Patrick Henry Building
601 D Street, N.W.
Room 10-013
Washington, DC 20530

Evaluation Office
Bureau of Competition
Federal Trade Commission
6th & Pennsylvania Ave., N.W.
Room 392
Washington, DC 20580

c. Review by Section, Task Force, or Field Office

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[292] See H.R. Rep. No. 103-94, at 19 (1993); S. Rep. No. 103-51, at 11 (1993).

[293] See S. Rep. No. 103-51, at 13 (1993).

[294] See H.R. Rep. No. 98-1044, at 18-19 (1984).

The Antitrust Division has certain responsibilities under the NCRPA, including receipt of parties' original and supplemental notifications of their joint venture activities and publication of Federal Register notices describing joint ventures that elect to file notifications under section 6 of the Act. The 1993 amendments also require the Attorney General to provide annual and triennial reports on joint ventures that file notifications under the Act.

Once a party submits a notification under the Act, it is date-stamped and recorded. A copy of the notice is then forwarded to the appropriate component for immediate review. Upon receipt, the section, task force, or field office reviews the notification expeditiously to determine whether it adequately identifies the parties to the venture and describes the venture's nature and objectives. The legislative history indicates that the extent of the disclosure in the notification is largely up to the parties to the venture. However, sufficient information must be provided to enable the Department to publish the Federal Register notice described below. If there is doubt as to the adequacy of the notification, the Director of Merger Enforcement should be contacted immediately. Because only conduct that is within the scope of a notification that has been filed under section 6(a) of the Act[295] receives protection from treble damage liability,[296] persons providing information to the antitrust enforcement agencies for the purpose of obtaining or extending the protections of the NCRPA should always do so in accordance with the statutory requirements.

All information and documentary material submitted as part of a notification filed under the Act, as well as all other information obtained by the Department in the course of any investigation, administrative proceeding, or case with respect to a potential violation of the antitrust laws by a joint venture with respect to which such notification was filed, is exempt from disclosure under the Freedom of Information Act, and may not be made publicly available except in a judicial or administrative proceeding in which such information and material is subject to a protective order.[297] Thus, all notifications should be held strictly confidential.

(i) Original Notifications

Notifications filed under the NCRPA must include the identities of all parties to the venture and

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[295] 15 U.S.C. § 4305(a).

[296] See 15 U.S.C. § 4303(a).

[297] See 15 U.S.C. § 4305(d).

a description of the nature and objectives of the venture, including a concise statement of its purpose. Organizations that are parties to joint ventures for research and development only should be identified by name and the location of their principal executive offices (city and state). Notifications concerning joint ventures for production should state clearly that a purpose of their venture is production, and must also provide the nationality of all parties and the identity and nationality of all persons controlling such parties. Organizations that are parties (or persons controlling parties) to joint ventures involving production should be identified, in the case of a corporation, by providing the name, place of incorporation (the state of incorporation if the corporation is domestic and the country of incorporation if the corporation is foreign), and location of principal executive offices. In the case of an unincorporated firm, comparable identifying information must be provided. If this information has not been submitted, parties should be informed as promptly as possible that their notice is not sufficient to qualify for the protections of the Act and that a Federal Register notice will not be published until a proper notification has been submitted.

(ii) Supplemental Notifications

Frequently, notifications are filed to extend the protections of the NCRPA to existing ventures that have changed membership or objectives. When this type of supplemental notification is received from a venture, it will be necessary to review the venture's previous filings in order to verify that a notification providing complete information concerning all the parties to the venture and the purpose(s) of the venture has been filed. After a notification has once been submitted providing such complete information for a venture, supplemental notifications need only reflect the changes to the venture being disclosed (e.g., the parties being added or dropped and any changes in the nature and objectives of the venture).

(iii) Reporting Requirements

In order to assist the Division to compile the annual and triennial reports to Congress discussed below in Section H.2.g two worksheets have been devised that collect relevant information on the purpose of a venture, the identity and nationality of the parties and controlling persons, and other identifying information. These worksheets must be completed by the section, task force, or field office and submitted to the Premerger Notification Unit/FTC Liaison Office along with the draft Federal Register notice.

(iv) NCRPA Worksheets

JOINT VENTURE WORKSHEET
(First Filings)

A. Name of venture:_____

Nature of notification: _X_ original ___ supplemental

Concise statement of purpose: _____
_____
_____

B. For venture involving research and development only:

Identity of parties to venture:

1. _____
2. _____

C. For ventures involving production:

Identity and nationality of parties to joint production venture.

Identity	Nationality	Place of Incorporation	Location of Principal Executive Office
1.			
2.			

Identity and nationality of persons who control parties to joint production venture.

Identity	Nationality	Place of Incorporation	Location of Principal Executive Office
1.			
2.			

JOINT VENTURE WORKSHEET
(Supplemental Filings Only)

A. Name of venture:_____

Nature of notification: ___ original _X_ supplemental

Concise statement of purpose (if modified): _____
_____
_____

B. For ventures involving research and development only:

Identity of parties added to venture:	Identity of parties dropped from venture:
1. _____	1. _____
2. _____	2. _____

C. For ventures involving production:

Identity and nationality of parties added to joint production venture:

Identity	Nationality	Place of Incorporation	Location of Principal Executive Office
1.			
2.			

Identity of parties dropped from joint production venture:

Identity	Nationality	Place of Incorporation	Location of Principal Executive Office
1.			
2.			

Identity and nationality of persons who control parties added to joint production venture:

	Identity	Nationality	Place of Incorporation	Location of Principal Executive Office
1.				
2.				

Identity and nationality of persons who control parties dropped from joint production venture:

	Identity	Nationality	Place of Incorporation	Location of Principal Executive Office
1.				
2.				

The most common error made by staffs when filling out the supplemental filings worksheet (beyond simply failing to provide all of the required information) is to fill in the field for "concise statement of purpose" with something like "Change in Membership" when the parties have not modified the purpose of the venture. This data field is asking for the purpose of the venture, not for the purpose of the notification. If the only thing being notified is a change in the membership of the venture, the "concise statement of purpose" field should be left blank or filled in with "No change." In addition, when a supplemental notification has been filed disclosing a name change for a party to the venture, the proper worksheet procedure is to list the old name in the "party dropped" field and the new name in the "party added" field; adding a new data field for change of name is not appropriate.

d. Preparation of the Federal Register Notice

The Act provides that the Attorney General or the FTC shall, not later than 30 days after receiving a notification, publish in the Federal Register a notice that identifies the parties to the venture and describes in general terms the venture's area of planned activity.[298] The Division has assumed the responsibility of publishing notices in the Federal Register for all notifications filed under the NCRPA.

[298] 15 U.S.C. § 4305(b).

Parties filing notifications should submit a draft Federal Register notice along with their notification. If the parties have not done so, the staff prepares the notice. Prompt preparation and publication of the notice is required. The staff must keep in mind that both the provisions of the NCRPA and its legislative history indicate concern that competitors not have access to confidential details that a party may wish to provide in its notification, but that need not be made public in order to describe the area of planned activity of a venture.

(i) Sample Federal Register Notice

FEDERAL REGISTER NOTICE

U.S. Department of Justice
Antitrust Division

NOTICE PURSUANT TO THE NATIONAL COOPERATIVE RESEARCH AND PRODUCTION ACT OF 1993 -- [NAME OF JOINT VENTURE]

Notice is hereby given that, on [INSERT DATE NOTICE RECEIVED AND STAMPED IN PREMERGER NOTIFICATION UNIT/FTC LIAISON OFFICE], pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. § 4301 et seq. ("the Act"), [JOINT VENTURE] has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing (1) the identities of the parties and (2) the nature and objectives of the venture. The notifications were filed for the purpose of invoking the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances.

Pursuant to Section 6(b) of the Act, the identities of the parties are: [LIST PARTIES' NAMES, CITY, AND STATE OR COUNTRY OF PARTIES' PRINCIPAL PLACE OF BUSINESS IN ONE CONTINUOUS PARAGRAPH, SEPARATING EACH WITH A SEMICOLON].

The [JOINT VENTURE]'s general area(s) of planned activity is/are: [DESCRIBE GENERAL AREA OF PLANNED ACTIVITY OF THE JOINT VENTURE].

[DESIRABLE BUT NOT REQUIRED IS THE IDENTIFICATION OF AN INDIVIDUAL FROM WHOM ADDITIONAL INFORMATION CONCERNING THE VENTURE CAN BE OBTAINED.]

Director of Operations
Antitrust Division

e. Notice to Parties

The Act requires that the proposed Federal Register notice be made available to the parties to a venture prior to its publication. Thus, when the notice is prepared, the draft should be sent to the parties as expeditiously as possible. This must be done in writing, and appropriate records kept. If the parties are local, they can be invited to pick up the draft notice to save time. Otherwise, it is acceptable to fax the draft to the parties.

Any party filing a notification is invited to include evidence (a simple declaration will suffice) of the fact that it has been authorized to review a draft notice on behalf of all venturers. Otherwise, the notification must include the names and addresses of other persons to whom the notice should be made available.

In view of the fact that the Federal Register notice must be published within 30 days of receipt of the Division's receipt of notification, parties are asked to express any objections they have to the draft notice no later than two working days after receiving it. An effort should be made to resolve any such objections, keeping in mind the requirements of the Act and the purpose of the notice. If the Division and the parties are unable to agree on the contents of the Federal Register notice, the parties have the option of withdrawing their notification, but must do so before publication of the notice.

(i) Sample Transmittal Letter

[NAME AND ADDRESS OF NOTIFIER]

Re: National Cooperative Research and Production Act of 1993 -- [NAME OF JOINT VENTURE]

Enclosed for your review is a proposed Federal Register notice regarding [NAME OF JOINT VENTURE]. The statutory deadlines on these matters require a fairly quick turn around on your part. Accordingly, please contact us by telephone or by fax no later than two working days after receipt of the draft notice if you have any objections to it, or if you want to discuss it further. If we do not hear from you within that time, we will proceed with providing public notice in the Federal Register. Please call me [phone number] or [Chief or Assistant Chief and phone number] with any questions or problems.

Sincerely,

Enclosure

(ii) Sample Declaration

DECLARATION OF [NAME] PURSUANT TO 28 U.S.C. § 1746

Pursuant to 28 U.S.C. § 1746, I, [NAME] state as follows:

1. I am [TITLE] of [JOINT VENTURE] .

2. I am filing written notification pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993 (the "Act"), Pub. L 103-42, on behalf of [JOINT VENTURE] with the Department of Justice and the Federal Trade Commission.

3. I have been authorized to receive for review the Federal Register notice that the Department of Justice or Federal Trade Commission is required by Section 6(b) of the Act to make available to the parties to the venture described in the above-mentioned notification.

I declare under the penalty of perjury that the foregoing is true and correct. Executed on [DATE]

_____

[Signature]

f. Review and Publication of Notice

After the notice has been prepared and reviewed by the parties, it is forwarded to the Premerger Notification Unit/FTC Liaison Office along with a memorandum setting forth the date on which the notification was received by the Division, a copy of the letter or letters making the draft notice available to the parties, and a description of any problems or objections regarding contents. The draft notice and memorandum should then be forwarded as soon as possible, but no more than 14 calendar days after the section, task force, or field office has received the notification from the Premerger Notification Unit/FTC Liaison Office. After review, the Premerger Notification Unit/FTC Liaison Office forwards the notice to the Federal Register for publication, and arranges for permanent records of the notifications and Federal Register notices to be maintained.

g. Reports to Congress

New reporting requirements were imposed on the Department by the 1993 amendments. These amendments require the Attorney General to provide annual and triennial reports on joint ventures that file notifications under the Act. The purpose of the required reports is to inform Congress and the American people of the effect of the NCRPA on the competitiveness of the United States in key technological areas of research, development, and production. The reports are of three types:

(i) Annual Report by the Attorney General

In the 30-day period beginning at each 1-year interval in the 6-year period beginning on June 10, 1993 (the date of the enactment of the Act), the Attorney General must submit to the Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate --

(1) a list of joint ventures for which notice was filed under section 6(a) of the National Cooperative Research and Production Act of 1993 during the 12-month period for which such report is made, including --

(A) the purpose of each joint venture;

(B) the identity of each party described in section 6(a)(1) of the Act; and

(C) the identity and nationality of each person described in section 6(a) (3) of the Act; and

(2) a list of cases and proceedings, if any, brought during such period under the antitrust laws by the Department of Justice or the Federal Trade Commission with respect to joint ventures for which notice had been filed.

(ii) Triennial Report by the Attorney General

In the 30-day period beginning at each 3-year interval in the 6-year period beginning on June 10, 1993, the Attorney General, after consultation with such other agencies as the Attorney General considers to be appropriate, must submit to the Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate a description of the technological areas most commonly pursued by joint ventures for production for which notice was filed under section (6)(a) of the National Cooperative Research and Production Act of 1993 during the 3-year period for which such report is made, and an analysis of the trends in the competitiveness of United States industry in such areas.

(iii) Review of Antitrust Treatment Under Foreign Laws

In the three 30-day periods beginning 1 year, 3 years, and 6 years after June 10, 1993, the Attorney General, after consultation with such other agencies as the Attorney General considers to be appropriate, must submit to the Committee on the Judiciary of the House of Representatives and the

Committee on the Judiciary of the Senate a report on the antitrust treatment of United States businesses with respect to participation in joint ventures for production, under the law of each foreign nation any of whose domestic businesses disclosed its nationality under section 6(a)(3) of the National Cooperative Research and Production Act of 1993 at any time.

3. Export Trade Certificates

a. Overview of the ETC Act

The Export Trading Company Act of 1982, Pub. L. No. 97-290, 96 Stat. 1233, ("the ETC Act") is designed to increase U.S. exports of goods and services. Title III of the ETC Act, 15 U.S.C. §§ 4011-4021, reduces uncertainty concerning the application of the U.S. antitrust laws to export trade through the creation of a procedure by which persons engaged in U.S. export trade may obtain an export trade certificate of review ("ETCR").

ETCRs are issued by the Secretary of Commerce with the concurrence of the Attorney General. Persons named in the ETCR obtain limited immunity from suit under both federal and state antitrust laws for activities that are specified in the certificate and that comply with the terms of the certificate. In order to obtain an ETCR, an applicant must show that proposed export conduct will:

(1) result in neither a substantial lessening of competition or restraint of trade within the United States nor a substantial restraint of the export trade of any competitor of the applicant;

(2) not unreasonably enhance, stabilize, or depress prices in the United States of the class of goods and services covered by the application;

(3) not constitute unfair methods of competition against competitors engaged in the export of the class of goods or services exported by the applicant; and

(4) not include any act that may reasonably be expected to result in the sale for consumption or resale in the United States of such goods or services.

15 U.S.C. §4013(a). Congress intended that these standards "encompass the full range of the antitrust laws," as defined in the ETC Act.

Although an ETCR provides significant protection under the antitrust laws, it has certain limitations.

First, conduct that falls outside the scope of a certificate remains fully subject to private and governmental enforcement actions. Second, an ETCR that is obtained by fraud is void from the outset and thus offers no protection from the antitrust laws. Third, any person that has been injured by certified conduct may recover actual (though not treble) damages if that conduct is found to violate any of the statutory criteria described above. In any such action, certified conduct enjoys a presumption of legality, and the prevailing party is entitled to recover costs and attorneys' fees. Fourth, an ETCR does not constitute, explicitly or implicitly, an endorsement or opinion by the Secretary of Commerce or by the Attorney General concerning the legality of such business plans under the laws of any foreign country.

The Secretary of Commerce may revoke or modify an ETCR if the Secretary or the Attorney General determines that the applicant's export activities have ceased to comply with the statutory criteria for obtaining a certificate. The Attorney General may also bring suit under Section 15 of the Clayton Act, 15 U.S.C. § 25, to enjoin conduct that threatens "a clear and irreparable harm to the national interest," even if the conduct has been approved as part of an ETCR.

The Commerce Department, in consultation with the Department, has issued regulations for issuing ETCRs, see 15 C.F.R. §§ 325.1 et seq., and guidelines setting forth the standards used in reviewing ETCR applications, see 50 Fed. Reg. 1786 (1985). The ETC Guidelines contain examples illustrating application of the certification standards to specific export trade conduct, including the use of vertical and horizontal restraints and technology licensing arrangements. In addition, the Commerce Department's Export Trading Company Guidebook provides information on the functions and advantages of establishing or using an export trading company, including factors to consider in applying for an ETCR. The Commerce Department's Office of Export Trading Company Affairs provides advice and information on the formation of export trading companies and facilitates contacts between producers of exportable goods and services and firms offering export trade services.

b. Initial Processing of an Application

Once a complete ETCR application is submitted to the Commerce Department, a determination generally must be made within 90 days. If the Commerce Department proposes to issue a certificate, and we do not object within the time provided in the regulations, the certificate may be issued, and the immunity granted, without our express concurrence. Accordingly, it is extremely important that Division attorneys meet the deadlines set forth herein.

All ETCR applications are filed with the Commerce Department, which reviews them to determine

if they are complete.[299] The Commerce Department must make its determination within five working days; when the application is complete, it is "deemed submitted" and the statutory 90-day period begins to run. A copy of the application must be given to the Division within seven days after it is deemed submitted.

The Foreign Commerce Section is responsible for receiving, logging, copying, assigning, and circulating applications to the civil litigating components for review, generally making assignments on the basis of industry or regulatory expertise. The Premerger Notification Unit/FTC Liaison Office notifies the FTC of pending applications, and determines if the FTC has any pending matters or particular expertise related to the application. The FTC, however, has no role in determining whether a certificate should be issued, so this "clearance" process differs from the formal clearance process we normally employ in other types of investigations.

Once an application is assigned to a section, task force, or field office, no preliminary inquiry authority is needed in order to contact third parties to obtain industry information or other information useful in processing an application. The Foreign Commerce Section is responsible for coordinating all ETC activities in order to maintain consistent Division policy and procedure. Accordingly, copies of all memoranda and correspondence should be sent to Foreign Commerce throughout the review process.

c. Requests for Supplemental Information

(i) Informal Requests

Although formal requests for information are permitted by the ETC Act and regulations and can be useful, they are not the exclusive means of obtaining information, and ordinarily should not be used in the first instance. Rather, the most useful way to obtain information is to arrange very early in the review process for a meeting or telephone conference call with the Commerce Department attorney assigned to the matter and the applicant. During this informal interview, most questions can be answered. This is, therefore, usually the quickest and most efficient means of obtaining supplemental information. If it is necessary to clarify specific information obtained in such an interview, the staff attorney should consider whether to send a letter to the applicant confirming the conversation

[299] The Division has no role in determining whether an application is complete. If an application has been accepted that, in the staff's view, does not contain important information, the needed information should be sought in a request for supplemental information.

(coordinating with the Commerce Department), or whether to rely on a file memorandum of the interview. If there are questions remaining after an informal interview, the attorney should consider whether to proceed by means of a formal request for information.

(ii) Formal Requests

The Commerce Department may seek additional information "necessary to make a determination on the application," and must do so if the Division so requests. 15 C.F.R. § 325.3(g). A formal Request for Supplemental Information ("Request") may be used to obtain documents or answers to questions, and the rule is arguably broad enough to encompass a request for an interview. The reviewing component, in consultation with the assigned economist and Foreign Commerce, should determine whether such a Request is necessary in order to determine if the application meets the standards of the ETC Act. If they conclude that a Request is necessary, the reviewing component should submit the proposed Request to the Director of Civil Non-merger Enforcement, through the Foreign Commerce Section, ordinarily by the 20th day of an application's review. The reviewing component should also notify the Commerce Department that it intends to submit a Request prior to doing so.

If the applicant agrees to submit the requested information, the 90-day period is tolled from the date the Request is sent to the applicant by the Commerce Department until the date when the information is received by Commerce and is considered complete by Commerce (and by the Division, if we prepared the Request). See 15 C.F.R. § 325.3(g). The Commerce Department will notify us if the applicant has agreed to supply the information. If the applicant does not agree, the Division may notify the Commerce Department by letter from the Director of Civil Non-merger Enforcement that the information in our possession is inadequate to make a determination. The Secretary of Commerce is then required to deny the application if it is not withdrawn.

If the Commerce Department makes a Request, the information will be provided to us when it is received. However, unless the Division has also requested the information, the Commerce Department has sole authority to decide whether the information submitted in response to the Request is complete.

When the information is received, the reviewing component should review it promptly, i.e., within five days, to determine if it is complete. Written confirmation that it is a complete response should be sent by the Chief to the Commerce Department. The Foreign Commerce Section should also receive a copy of the letter for purposes of recalculating the statutory deadlines. If the response is not complete, the reviewing component should informally contact the Commerce Department to attempt to obtain a

complete response from the applicant. The reviewing component should carefully consider whether a determination whether the application should be granted can be made on the basis of the available information or whether the application must be denied because the applicant has not met its burden. In the former case, the reviewing Chief should send a letter to the Commerce Department withdrawing the unanswered requests, thus restarting the statutory clock. In the latter case, the reviewing component should prepare a letter for the signature of the Director of Civil Non-merger Enforcement setting forth the deficiencies in the response and stating that the information in our possession is insufficient to make the determination. The applicant must then withdraw the application or have its application denied.

Except in extraordinary circumstances, only one Request will be sent during the review of any application. Accordingly, Requests should include all documents and information reasonably necessary to decide whether the proposed activities should be certified, but should also be drafted as specifically and narrowly as possible to avoid unnecessary burden and delay. Since only one Request will be sent, it is important to ensure, before certifying the response as complete, that all of the requested documents and information that are reasonably necessary have been received. Technical but unimportant deficiencies will not be asserted as a reason for declining to certify the response as complete.

(iii) CIDs

In certain circumstances, CIDs may be used to obtain information necessary to evaluate an application: if the conduct in question is ongoing and there is an antitrust investigation into "whether any person is or has been engaged in any antitrust violation," or if proposed conduct in an application is a "merger, acquisition, joint venture, or similar transaction, which if consummated, may result in an antitrust violation," then CIDs may be used (provided that the other requirements of the ACPA are met). 15 U.S.C. § 1311(c).

CIDs should be used very sparingly in connection with ETC's because of the need for speed in evaluating applications. CIDs do not toll the statutory 90-day period, and thus are rarely, if ever, preferable to a Request, which does. Information obtained by CID during the evaluation of an application should not be disclosed to the Commerce Department, except in connection with a modification or revocation proceeding, as provided in 15 C.F.R. § 325.10(d).

d. Confidentiality of Information

Section 309 of the ETC Act, 15 U.S.C. § 4019, establishes the conditions under which information submitted by any person "in connection with the issuance, amendment, or revocation of a

certificate" must be kept confidential. Information submitted in connection with the issuance, amendment, or revocation of a certificate is exempt from disclosure under the Freedom of Information Act. See 15 U.S.C. § 4019(a).

In addition, the Division and the Commerce Department are prohibited from disclosing commercial or financial information that is privileged or confidential, if disclosure would harm the person who submitted it, except in certain circumstances that are identified in the ETC Act, see 15 U.S.C. § 4019(b), and in the regulations, see 15 C.F.R. § 325.16(b)(3). (The person that submitted the information may designate it as privileged or confidential, but such designation is not dispositive of whether it falls into that category.) If disclosure is sought in connection with a judicial or administrative proceeding (one of the enumerated exceptions), the Division is required to attempt to notify the person who submitted the information. See 15 C.F.R. § 325.16(c).

e. Analysis of the Application

The first step in analyzing an application is to determine whether the applicant and conduct sought to be certified are eligible for certification. An applicant must be a "person" as defined in 15 U.S.C. § 4021(5). The ETC Guidelines § III.A provide additional information about the meaning of "person." In addition, conduct must be "limited to export trade," 15 U.S.C. § 4012(a)(1), as that term is defined in 15 U.S.C. § 4021(1). The meaning of export trade activity is discussed in the ETC Guidelines § III.B.

The next step is to determine whether the applicant meets the statutory standards for obtaining a certificate, which are set out above. See 15 U.S.C. § 4013(a). As noted above, the statutory standards are intended to encompass the full range of the antitrust laws. The ETC Guidelines § IV provide a detailed discussion of these standards and their application to hypothetical situations. Finally, the reviewing component must determine that the language in the proposed certificate is neither imprecise nor vague. Such language may result in an overbroad grant of antitrust immunity, or may subject the certificate holder to liability for conduct it incorrectly assumed was covered by the certificate.

By informal agreement, the Commerce Department and the Division are committed to notifying each other as soon as either agency believes there to be a problem with a certificate. This practice will allow maximum time to resolve any issues without either denying the application or requesting the applicant's consent to a 30-day extension of the 90-day statutory period. See 15 C.F.R. § 325.5(a). In particular, the reviewing component should attempt to have the Commerce Department place in the draft certificate any conditions or modifications we believe will be required.

If the Attorney General or the Secretary of Commerce considers it necessary, and the applicant agrees, the deadline for decision may be extended by 30 days. See 15 C.F.R. § 325.5(a). Such extensions are sought only in unusual circumstances and are arranged in consultation with the Commerce Department and the applicant.

f. Recommendation and Review

The reviewing component will prepare a written recommendation of what action should be taken on the application. The component and the assigned economist are responsible for coordinating their review to ensure appropriate EAG input the analysis leading to the recommendation. The recommendation package must include the following:

a) A memorandum from the Chief to the Director of Civil Non-merger Enforcement explaining the recommendation and the reasons for it. The first page must state clearly the applicable deadline for decision and communication of our decision to the Commerce Department.

b) The proposed certificate submitted by the Commerce Department. (Commerce must provide the proposed certificate to us no later than the 60th day of the review period.)

c) A proposed letter from the AAG to the General Counsel of the Commerce Department stating the Department of Justice's decision on the application. If the recommendation is to decline to concur, the letter must explain the reason for the nonconcurrence.

d) If the proposed conduct could be certified in whole or in part, but not on the basis of the language in the Commerce Department's proposed certificate, a proposed revised certificate must be enclosed with the proposed AAG letter.

The original and one copy of the recommendation must be given to Foreign Commerce, for forwarding to the Director of Civil Non-merger Enforcement, no later than the 70th day of the review process. (This date will be specified in the cover memorandum from Foreign Commerce making the initial assignment.) Any separate recommendation from EAG must be sent forward on the same day.

The Director of Civil Non-merger Enforcement will review the recommendation and forward it to the AAG for a determination as to whether to concur in the issuance of the proposed certificate. The AAG's decision must be made and sent to the Commerce Department by no later than the 80th day, i.e., ten days prior to the expiration of the statutory deadline.

Time may be very short between the receipt of the proposed certificate from the Commerce Department and the time by which the AAG must make a decision on the application. Ordinarily, the Commerce Department and the staff will have discussed the proposed certificate well in advance of its formal submission. However, we cannot be certain about the terms contained in the proposed certificate until the Commerce Department sends it to us 20 days before the expiration of our deadline. Accordingly, the staff should endeavor to obtain Commerce Department agreement to any necessary changes before submitting its recommendation to the Director of Civil Non-merger Enforcement.

g. Decision by the Assistant Attorney General

The AAG must decide whether to concur in the Commerce-proposed certificate and communicate that decision to Commerce no later than ten days prior to the end of the statutory time period for final determination. See 15 C.F.R. § 325.5(c)(2). This decision will be communicated to the Commerce Department by letter, with the proposed certificate attached. If the decision is not to concur in the issuance of the certificate, the AAG must "state the reasons for the disagreement" with the proposed certificate. Id. Thus, the letter prepared for the AAG by the reviewing component must be adequate in this regard. If the AAG does not communicate a decision to the Commerce Department by the 80th day deadline, the Division is deemed to have concurred in the proposed certificate. See 15 C.F.R. § 325.5(c)(3).

If the AAG disagrees with the proposed certificate, the Commerce Department may choose to revise the proposed certificate to respond to our concerns. The certificate may not be issued unless the AAG concurs in the revision. See 15 C.F.R. § 325.5(c)(2). The Commerce Department must consult with the applicant before issuing any certificate different from that proposed by the applicant. See 15 C.F.R. § 325.5(d). If the matter cannot be resolved before the statutory deadline, the AAG or the Commerce Department may take up to an additional 30 days to make a decision, if one or both agencies considers it necessary and the applicant consents. The request for an extension ordinarily will be made by the Commerce Department.

h. ETC Notebook

Each of the Division's civil litigating components should have a copy of the ETC Notebook, which is prepared and periodically updated by the Foreign Commerce Section. The Notebook outlines other procedural aspects of the ETC process, including handling of requests for expedited treatment, requests for reconsideration, and revocation and modification procedures. In addition, the Notebook contains the ETC Act, implementing regulations, ETC Guidelines, excerpts from the ETC Act's legislative history,

and sample letters and exemplars.

4. Judgment Monitoring, the JEMIS System and Judgment Enforcement

a. Judgment Monitoring

In May 1984, the Division lodged in its litigating sections and field offices direct responsibility for all outstanding judgments. At that time, every decree was assigned to an attorney who became responsible for monitoring compliance, initiating any appropriate enforcement actions and considering whether the decree was a candidate for modification or termination.

The specific steps necessary to ensure compliance with a decree will vary depending on the nature of the decree. Where a judgment requires affirmative acts, e.g., divestiture, submission of periodic reports, etc., it will be necessary to determine whether the required acts have occurred and to evaluate the sufficiency of compliance. With respect to judgments that prohibit certain actions, it may also be necessary to conduct periodic inquiries to determine whether defendants are observing the prohibitions. Such inquiries should be scheduled when and as appropriate.

When periodic inquiries fall due, they should be conducted in a manner that maximizes the likelihood of detecting behavior violative of the decree and yet minimizes the investigative effort. The first stage should be limited to informal contact with the defendants and an analysis of publicly available information. Review of such information may be sufficient to demonstrate that a firm has not violated a decree provision. If an informal inquiry leads the assigned attorney to believe that there may be a violation, then preliminary inquiry authority must be requested. As with all investigations, FTC clearance must also be obtained, as a means of notifying the FTC that we will be conducting an investigation.

b. JEMIS and Reporting Requirements

The decentralization of our judgment monitoring and enforcement responsibilities has made it necessary to establish the Judgment Enforcement Management Information System (JEMIS), a computer-supported system designed to catalog and track compliance with the Division's injunctive decrees. JEMIS is administered and monitored by the office of the Deputy Assistant Attorney General ("DAAG") for criminal enforcement. All of our older civil decrees have been coded and placed in the JEMIS system. The DAAG office is responsible for ensuring that all new judgments are recorded in the database.

The JEMIS system contains two functional classes of information. The first group contains basic data about each decree, including the type of case and violation, product and geographic descriptions, file numbers, status of the decree, dates of entry of modifications and terminations, and a listing of judgment provisions. The second group contains defendant-specific information, including the names of all defendants, and reflects, for each defendant, dates when affirmative acts are due, dates of compliance with those requirements, complaints about the defendants, and corporate histories.

Each section, task force, and field office has a JEMIS coordinator who directs communication between the component and the DAAG office. The attorney assigned to a particular judgment is responsible for reporting, through the coordinator, any changes that have occurred with respect to a judgment since its entry. Information commonly reportable includes changes in corporate name, decree terminations or modifications, receipt of compliance reports, dates on which other affirmative acts (such as divestiture) occurred, changes in corporate status, such as bankruptcy, and information relating to successors, acquisitions and mergers.

c. Judgment Enforcement

If, as a result of a preliminary inquiry, the staff concludes that the final judgment may have been violated, consideration should be given to instituting an enforcement action. There are two types of contempt proceedings, civil and criminal, and either or both may be used. Attorneys should consult United States Attorney's Manual § 9-39.000 et seq. for additional information about contempt proceedings.

Civil contempt has a remedial purpose--compelling obedience to an order of the court for the purpose of enforcing the government's rights or obtaining other relief. See IBM v. United States, 493 F.2d 112, 115 (2d Cir. 1973). In designing an appropriate remedy, the staff should consider seeking both additional injunctive relief and fines that accumulate on a daily basis until compliance is achieved. See United States v. United Mine Workers, 330 U.S. 258 (1947); United States v. Work Wear Corp., 602 F.2d 110 (6th Cir. 1979). Civil contempt is established by "clear and convincing" proof that there is a lawful order and that the order was violated. See Kansas City Power & Light Co. v. NLRB, 137 F.2d 77, 79 (8th Cir. 1943). Willfulness need not be shown, and good faith is not a defense. See McComb v. Jacksonville Paper Co., 336 U.S. 187, 191 (1949).

Criminal contempt is not remedial: its purpose is to punish the violation, to vindicate the authority of the court, and to deter others from engaging in similar conduct in the future. Criminal contempt is established under 18 U.S.C. § 401(3) by proving beyond a reasonable doubt that there is a clear and

definite order, applicable to the contemnor, which was knowingly and willfully disobeyed. See Chapman v. Pacific Telephone & Telegraph Co., 613 F.2d 193, 195 (9th Cir. 1979); United States v. Metropolitan Disposal Corp., 622 F. Supp. 1262 (D. Ore. 1985), aff'd per curiam, 1986 Trade Cas. (CCH) ¶ 67,258 (9th Cir. 1986). Willfulness may be inferred from the facts and circumstances, see United States v. Greyhound Corp., 508 F.2d 529, 532 (7th Cir. 1974), and from a reckless disregard of obligations to the court, see In re Allis, 531 F.2d 1391, 1392 (9th Cir.), cert. denied, 429 U.S. 900 (1976); Metropolitan Disposal, 622 F. Supp. at 1264-65. The penalty may be a fine or imprisonment, or both.

Jurisdiction and venue for contempt proceedings rest with the court whose order has been disobeyed. See Leman v. Krentler-Arnold Hinge Last Co., 284 U.S. 448 (1932). Both civil and criminal contempt may be instituted by a petition for an order to show cause why the respondent should not be held in contempt. See Fed. R. Crim. P. 42(b). A criminal contempt proceeding may also be instituted by indictment, see United States v. Snyder, 428 F.2d 520, 522 (9th Cir.), cert. denied, 400 U.S. 903 (1970), or by petition following a grand jury investigation, see United States v. General Dynamics Corp., 196 F. Supp. 611 (E.D.N.Y. 1961). If the proceeding is handled by indictment, the notice requirements of Rule 42(b) must be satisfied.

The Antitrust Division has instituted a number of contempt proceedings to enforce its judgments. See, e.g., United States v. Work Wear Corp., 602 F.2d 110 (6th Cir. 1979); United States v. Greyhound Corp., 508 F.2d 529 (7th Cir. 1974); United States v. North Suburban Multi-List, Inc., 1981-2 Trade Cas. (CCH) ¶ 64,261 (W.D. Pa. 1981); United States v. FTD Corp., No. CIV. A. 56-15748, 1995 WL 864082 (E.D. Mich., Dec. 14, 1995); United States v. Restonic Corp. (N.D. Ill. filed Nov. 21, 1994); United States v. Washington Mills Electro Minerals (W.D.N.Y. filed Feb. 11, 1994); United States v. NYNEX Corp., 814 F. Supp. 133 (D.D.C.), rev'd and vacated, 8 F.3d 52 (D.C.Cir. 1993); United States v. Twentieth Century-Fox Film Corp., 700 F. Supp. 1246 (S.D.N.Y. 1988), modified, 882 F.2d 656 (2d Cir. 1989), cert. denied, 493 U.S. 1021 (1990); United States v. United Artists Theatre Circuit, Inc. (E.D. Wis. filed Oct. 29, 1987); and United States v. H.P. Hood Inc. (D. Vt. filed Aug. 23, 1983). Additional cases and information may be obtained from the office of the Deputy Assistant Attorney General for criminal enforcement.

Finally, in some situations, rather than seeking sanctions for contempt where the correct interpretation of a judgment is disputed, it may be appropriate simply to obtain a court order compelling compliance with the judgment. See, e.g., United States v. CBS Inc., 1981-2 Trade Cas. (CCH) ¶ 64,227 (C.D. Cal. 1981).

5. Judgment Modifications and Terminations

Attorneys assigned to decrees for enforcement purposes should also always consider whether the decree is or has become anticompetitive or otherwise undesirable. If so, consideration should be given to a modification or termination proceeding, consistent with the Division's resource availability. Decree provisions that were perfectly sensible when entered can become inappropriate over time. Also, certain provisions of a decree may reflect economic theories no longer accepted, e.g., that non-price vertical restraints should be treated as per se unlawful.

a. Phase One--Obtaining Approval to Consent to Modification or Termination

(i) Initiation of the Process

When a judgment is identified by staff as a candidate for possible modification or termination, or when a judgment defendant initiates a request to terminate or modify its decree, the section, task force, or field office should promptly request from each judgment defendant:

(1) a detailed explanation as to (a) why the judgment should be vacated or modified, including information as to changes in circumstances or law that make the judgment inequitable or obsolete, and (b) the actual anticompetitive or other harmful effects of the judgment;

(2) a statement of the changes, if any, in its method of operations or doing business that the defendant contemplates in the event that the judgment is vacated; and

(3) a commitment to pay the costs of appropriate public notices in the trade press and the Wall Street Journal, or as may otherwise be required by the Division, in connection with the proposed termination or modification of the judgment.[300]

After receipt of a satisfactory response to the request, the staff should submit a brief memorandum requesting preliminary inquiry authority. As soon as P.I. authority is received and we have clearance from the FTC, an investigation may be commenced to determine whether termination or modification

[300] In very exceptional circumstances, the Division may be willing to bear the costs of public notices--for instance, if the harmful effects of the judgment are being borne principally by third parties rather than by the defendant.

is in the public interest.

(ii) Recommendation, Review and Applicable Standards

At the conclusion of the investigation, the staff should prepare a memorandum for the appropriate Director of Enforcement setting forth its recommendation whether the Division should consent to terminate or modify the decree. The Division will usually give its consent when changed circumstances in the industry render previously neutral provisions anticompetitive. However, a demonstration of change is not essential, nor is it a prerequisite to termination that the decree actually has had anticompetitive effects. For example, the Division is likely to consent to modification or termination of a decree that prohibits the defendant from using efficient marketing techniques that (1) are available to other firms in the market, (2) would ordinarily be tested under the rule of reason, and (3) would not today restrain competition.

More specifically, if a decree pre-dates the decision in Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977), and contains absolute prohibitions on non-price vertical restraints, we are usually willing to vacate the decree on the grounds that such conduct is today judged under the rule of reason and the prohibition may inhibit procompetitive conduct. We are also inclined to vacate older decrees that only prohibit per se illegal conduct on the ground that such decrees merely duplicate existing law and are no longer needed for deterrence now that criminal Sherman Act abuses are felonies. Whether we will consent to terminate decrees that perpetually enjoin horizontal restraints will depend on the particular firms and industry. We would be inclined to oppose the termination of per se decrees against firms and industries that have a history of price fixing, particularly if the structure of the market remains conducive to cartel behavior. On the other hand, if the character of the industry or its firms has changed over the years and is no longer conducive to cartel behavior, we would be inclined to approve termination.

The Division is less likely to support termination of a decree if there are recent decree violations; ongoing violations militate even more strongly against Division support for termination.

b. Phase Two--Procedures for Termination or Modification

(i) Necessary Papers

If the staff's recommendation is to modify or terminate a decree, its recommendation should be accompanied by the following papers:

(1) a stipulation package, consisting of the Government's tentative consent to termination of the decree (prepared for the signatures of the staff, the Chief, the appropriate Director of Enforcement, the appropriate Deputy Assistant Attorney General, the Assistant Attorney General, and the defendants) and the following attachments:

(a) a form of notice to be printed in newspapers and periodicals (designated as Exhibit A),

(b) an order directing publication of the notice (designated as Exhibit B), and

(c) an order terminating the decree (designated as Exhibit C);

(In some jurisdictions the stipulation and order may be combined in one pleading, depending upon the local rules.)

(2) a Government memorandum of points and authorities;

(3) a Department press release;

(4) a Federal Register notice; and

(5) a memorandum describing the original complaint, the judgment, and relevant circumstances today.

Samples of each of these documents are available from the FOIA Unit and are available in the Work Product Document Bank. Since these exemplars are subject to continual revision, particularly the Government's memorandum, the staff should obtain recent exemplars before preparing the necessary papers.

The defendant should likewise prepare its motion. Further, where the Division is not aware of any violation of the decree, and the defendant asserts that it has always complied with the judgment, an officer of the defendant must attest to that effect. Sample motions and affidavits are also available from FOIA Unit. (They, along with the Division's exemplar papers, are considered matters of public record and may be made available to the moving defendants.)

(ii) Notice, Publication Costs and Multiple Defendants

As a matter of policy, the notice requesting public comment should generally appear in two consecutive issues of (1) the national edition of the Wall Street Journal ("WSJ"), and (2) the principal trade periodical serving the industry to which the decree relates. If the decree affects more than one industry, the notice should appear in the principal journal for each of the industries involved.

The publication costs for such notices are borne by the defendant and are not trivial. From time to time, a defendant will ask to be excused from WSJ publication on the grounds of expense. Division policy is not to accede to such requests except in rare instances where (1) WSJ publication costs would impose an extraordinarily harsh burden on the defendant, given its financial condition, or WSJ publication would clearly be wasteful and unnecessary; (2) publication is planned for other periodicals whose audience includes those likely to be interested in the decree (i.e., the defendant's competitors, suppliers, customers, etc.); and (3) there is no prospect of cost-sharing with other defendants in the case. See also supra Section H.4.a(i) (noting that in very exceptional circumstances, the Division may be willing to bear the costs of publication).

In addition to the defendant's notice publication, the Division also voluntarily publishes in the Federal Register a brief notice of the motion to modify or terminate. The notice should summarize the complaint and judgment, set out the procedures for inspecting and copying relevant papers, and invite comments. If possible, the length of this notice should not exceed two double-spaced typed pages (approximately one column in the Federal Register). The papers presented to the Court should not, however, order publication of the Federal Register notice.

In cases that involve multiple defendants, one defendant may be more enthusiastic about terminating the decree than the others and thus be willing to bear the full cost of doing so. In this situation, it is Division policy to request the other defendants to provide us with affidavits similar to that prepared by the volunteer defendant (including the sworn statement of compliance with the decree), and if they do so, to insist that the notice published by the volunteer recite the Division's consent to termination of the decree as to the other defendants.

(iii) Review, Filing and Other Procedural Aspects

The necessary papers should be sent to the appropriate Director of Enforcement for review. As a rule, the stipulation should already be signed by the defendants when the package is forwarded. After review, the Director will transmit the papers to the appropriate Deputy Assistant Attorney General and Assistant Attorney General for signature and then return them to the staff.

The staff must notify the Director's office 24 hours in advance of filing the papers so that the Public Affairs Office has sufficient lead time to finalize a press release if it wishes to issue one. The actual filing process will vary depending on the jurisdiction. In some areas, on the day the parties file their papers, counsel for the Government and the defendant appear before the appropriate judge to advise the Court concerning the proposed public comment process and to request entry of the order directing the defendant's publication of notice. In other jurisdictions, filing and entry of the public notice may be accomplished through the mails. Whichever procedure is used, the judge should be advised that any public comments received by the Department will be filed with the Court as they are received.

Immediately after the papers are filed, the staff must notify the Director's office (whether or not the publication notice has been entered) so that the press release can be issued and the notice published in the Federal Register. Shortly thereafter the staff should check to confirm whether a press release was issued. If any comments are received, they should be filed promptly with the Court. Then, during the 10-day period after the comment deadline, the staff should notify the Court whether the Department intends to file a response. If a response is appropriate (as is generally the case) and staff needs additional time to prepare it, the Government will seek the defendant's consent to an extension of time, or (if the defendant objects) request an extension from the Court. Responses to comments are to be sent to the appropriate Director of Enforcement for review.

A copy of the response filed in court is usually sent to all commentors at the time of filing. Note that unlike the procedures under the Antitrust Procedures and Penalties Act ("APPA") for entry of consent decrees, the response and comments for judgment terminations and modifications are not published in the Federal Register.

Once the notices have been published, the defendant should file a certificate attesting to that fact. The Division will also file a certificate when the time is proper for entry of the modification or termination order, assuming we have not withdrawn our consent. Exemplars of both defendant and Division certificates are available from the FOIA Unit and in the Work Product Document Bank. The staff also should send an accompanying letter to the Court explaining the significance of the certificate, and a clean copy of the decree termination order should be provided to the judge.

As a rule, we will not recommend that a hearing be held on the termination motion, unless there are compelling reasons why one is necessary. Further, although the Division will not object if interested persons apply to appear as amici curiae, we will generally object vigorously if they attempt to intervene as parties.